South Carolina Law Review

Volume 55
Issue 4 *SYMPOSIUM: COURT-ENFORCED SECRECY*

Article 3

Summer 2004

Hidden from the Public by Order of the Court: The Case against Government-Enforced Secrecy

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HIDDEN FROM THE PUBLIC BY ORDER OF THE COURT: THE CASE AGAINST GOVERNMENT-ENFORCED SECRECY

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[W]hat transpires in the court room is public property.
Craig v. Harney, 331 U.S. 367, 374 (1947).

I. INTRODUCTION

A. A Prelude

A visitor to the Office of the Clerk of Court for Aiken County, South Carolina desiring to learn of the allegations set forth in, and the ultimate resolution of, Civil Action No. 98-CP-01-1019 would be handed a sealed envelope bearing the following admonition signed by a state circuit judge:

> If anyone involved in this case, the attorneys, the parties, or any of their representatives should disclose the terms and conditions of the resolution of this case, they will be in contempt of this court. IT IS SO ORDERED.

A similar order is attached to the envelope containing the court documents in the United States District Court Clerk's office in Columbia, South Carolina in Civil Action No. 3:00-3768:

> [T]he entire record in this case, except for this order, including pleadings, exhibits, hearings, transcripts and prior opinions, memoranda and orders of this court will be sealed, and access to it by other persons other than the parties to this case shall be had only upon further order of this court. AND IT IS SO ORDERED.

The federal district courthouse in the District of Columbia has, in its index of cases, twelve lawsuits where even the identities of the parties to the dispute are protected by court-ordered secrecy. The captions in the index for all twelve are identical: "Sealed v. Sealed."[1]

These cases, and others like them, typify a discernable and troubling trend in civil litigation in the United States. Increasingly, litigants are requesting that courts "approve" a settlement (often in cases where court approval is not required by law) and, as part of the approval process, enter an order restricting public access to information about the case and its procedural history. Litigants in such cases, not content simply to agree between themselves to remain silent about the settlement, prefer to involve the trial judge in a "take it or leave it" consent order that would bring the might and majesty of the court system to bear on anyone who breaches the court-ordered confidentiality called for in the consent order. Trial judges, often

1. Elsa Walsh & Benjamin Weiser, *Public Courts, Private Justice: Hundreds of Cases Shrouded in Secrecy*, WASH. POST, Oct. 24, 1988, at A1.

struggling under the crush of burgeoning case loads and eager to achieve a settlement, all too frequently acquiesce in the request for court-ordered secrecy because they are told by counsel that to deny the request means the settlement will disintegrate and the case will go to trial.

Recent disclosures of sealed settlements in several high profile cases affecting public safety have served to undermine public confidence in the legal system and prompted several state legislative bodies and one United States Senator to attempt to deal with the problem legislatively. In my view, judges must become more sensitive to the potential mischief that can ensue when they enter secrecy orders without good reason.

The concept of "secrecy" or "confidentiality" in court proceedings and records encompasses many things. It can include:

> Protective orders that provide that discovery exchanged between the parties (which by federal rule is not filed with the court)[2] will be kept confidential and not be disclosed to parties outside of the litigation;
>
> Orders providing that evidence filed with the Clerk of Court is filed "under seal," meaning that the documents are available to the litigants and may be reviewed by the court in deciding an issue before it, but are not available to the public;
>
> The closing of courtrooms so that only the affected parties and court personnel are present;
>
> Orders "approving" a settlement and requiring one or more of the following:
>
> > A return, by the plaintiff, of all documents produced by the defendant during discovery;
> >
> > An agreement by plaintiff and plaintiff's counsel never to discuss the case or share information about the case;
> >
> > A "lawyer buyout" provision wherein plaintiff's counsel agrees not to represent future plaintiffs against the same defendant;
> >
> > The sealing of all prior court filings in the case;

2. FED. R. CIV. P. 5(d).

The vacating or depublishing of substantive orders previously entered;[3]

The destruction of documents filed with the court;[4]

Stipulations to change the name of the parties so that they would be unrecognizable to anyone going to the court file to examine the case;[5] and

A requirement that the amount of the monetary settlement be kept confidential.

B. The Confidentiality Debate

Over the past twenty years, as civil litigation has mushroomed in the courts of the United States, the question of the proper role of the judiciary in sanctioning confidentiality requested, or in many cases, insisted upon by the parties, has been the subject of extensive scholarly debate.

Professor Laurie Kratky Doré divides the opposing camps into what she calls "confidentiality proponents" and "public access advocates." Confidentiality proponents, according to Professor Doré, "highly value the use of confidentiality" and believe that existing rules (which essentially provide for trial court discretion) "adequately accommodate the competing interests that arise when secrecy issues emerge during the course of a lawsuit."[6] Professor Arthur Miller of Harvard Law School, one such proponent, suggests that reformers have exaggerated the extent of the problems with the current system and argues that judicial discretion to order confidentiality is a necessary response to the abuse of liberal discovery rules.[7] Those who favor the status quo suggest that when a case settles under a

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3. For an excellent analysis of the trend toward "vacatur on consent," see Judith Resnik, *Whose Judgment? Vacating Judgments, Preferences for Settlement, and the Role of Adjudication at the Close of the Twentieth Century*, 41 UCLA L. REV. 1471 (1994).

4. Such requests are made, although it is doubtful any court would go along. *See Secrecy and the Courts: The Judges' Perspective*, 9 J.L. & POL'Y 169, 193 (2000) (quoting U.S. District Judge John G. Koeltl, "One example . . . [of obligations the parties attempt to impose on the court is that] the court . . . destroy all materials [associated with the case] . . . . It's true!").

5. *See generally* Richard A. Zitrin, *Open Courts with Sealed Files: Secrecy's Impact on American Justice What Judges Can and Should Do About Secrecy in the Courts*, 9 n.4 (Jul. 29, 2000) (unpublished paper, presented at the 2000 Forum for State Appellate Court Judges, http://www.roscoepound.org/new/00zitrin.pdf) (referring to cases involving "professionals who did not want their names sullied by being found in the court record and conditioned settlement on such 'sanitization'").

6. Laurie Kratky Doré, *Secrecy by Consent: The Use and Limits of Confidentiality in the Pursuit of Settlement*, 74 NOTRE DAME L. REV. 283, 303 (1999).

7. *See generally* Arthur R. Miller, *Confidentiality, Protective Orders, and Public Access to the Courts*, 105 HARV. L. REV. 427 (1991).

"confidentiality agreement," the only thing that is generally kept from the public is the amount of the settlement.

Public access advocates, on the other hand, argue that courts are "publicly funded government institutions that serve interests broader than those of the immediate parties."[8] Because they "play a role beyond the resolution of the case at hand," courts should oppose "attempts by litigants to shield information or documents that are of public interest or that are relevant to public health and safety."[9] University of San Francisco Law School ethics professor Richard Zitrin, for example, suggests that "even private disputes take on a quasi-public character when brought [in] a public forum like a court."[10] Zitrin contends "there are enough examples of dangerous products and other threats to safety that have been hidden behind secrecy agreements to warrant a general policy of openness."[11]

In this Article, I explain why I believe that the public access advocates have the better argument. In my view, courts too often rubber-stamp confidentiality orders presented to them, sometimes altogether ignoring or merely giving lip service to the body of law and existing court rules that are supposed to apply when the parties request that discovery documents be filed under seal, that settlements be subject to a gag order, or that previously filed orders be vacated. I believe court-ordered secrecy is more prevalent than has been reported (and than most court docket entries reveal) and the involvement of trial judges in ordering secrecy (as opposed to simply allowing litigants to keep quiet by agreement) as part of an ongoing effort to settle cases at all costs is bad policy and is hurting the system of justice that we all hold dear. I know from experience that litigants frequently attempt to shield more than the amount of the monetary settlement from public view. I also know that court orders vacating substantive opinions or requiring the return or destruction of discovery documents determined to be relevant and admissible sometimes create additional work for judges and additional costs to litigants in later cases involving the same, or a similar, dispute. Unless judges are willing to be more circumspect in participating in what I prefer to call "government-enforced secrecy," the legislative branches of government may impose draconian rules that even public access advocates admit go too far.

The judges of the court on which I sit have attempted to address the issue through a series of amendments to our local rules. While some might argue our local rule changes go too far, the national debate that erupted when our rules were issued for public comment at least helped focus attention on the phenomenon of government-enforced secrecy. Hopefully, this attention has made trial judges who are charged with administering the rules that now apply more sensitive to the competing interests presented when the parties propose a bilateral secrecy agreement for court approval.

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8. Doré, *supra* note 6, at 307.
9. *Id.*
10. Zitrin, *supra* note 5, at 1.
11. *Id.*

Part II of this Article recounts the development of local rules for the District of South Carolina relating to court-ordered secrecy. Part III addresses and attempts to debunk most of the principal arguments made by opponents of our local rule changes. Part IV explains why sunshine is both necessary and desirable in the institution of government charged with searching for the truth.

II. THE SOUTH CAROLINA EXPERIENCE

From 2000 through 2003 the judges of the United States District Court for the District of South Carolina promulgated local rules designed to set out standard procedures to be followed when a litigant proposes to file a document with the court under seal. They also adopted an outright ban—subject, as will be seen, to an escape valve that exempts cases where privacy rights are legitimately involved—on court-ordered secrecy associated with the settlement of a case.

Critics who responded to our invitation for public comment suggested that, at least as far as secret settlements are concerned, our court was attempting to deal with a problem that did not exist. I can state from first-hand experience that these critics are wrong.

In seventeen years on the trial bench, I have been asked to (and in some cases, I regret to say, did):

> Enter orders restricting access to any information about the terms and amounts of settlement in litigation arising out of a major aviation disaster;[12]
>
> Seal parts of the record and impose court-ordered confidentiality upon the settlement of a major surface water contamination case;[13]
>
> Vacate substantive or dispositive orders previously entered in a case, thereby removing from the records any precedent that may have been established on complex legal issues;[14]

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12. *See In re* Air Crash at Charlotte, N.C. on July 2, 1994, C/A No. 3:95-1041 (D.S.C.). In this case, I ordered, at the request of all parties, that the terms and amounts of settlements in thirty-seven cases arising out of the crash of a major airliner be sealed.

13. *See* Whitfield v. Sangamo Weston, Inc., C/A No. 6:84-3184 (D.S.C.). This case involved over 350 plaintiffs who asserted a variety of claims against a chemical company that allegedly deposited polychlorinated biphenyls (PCBs) into Lake Hartwell, a 56,000 acre lake in upstate South Carolina. For a more complete discussion of this case, see *infra* note 48 and accompanying text.

14. *See* Univ. of S.C. v. Royal Ins. Co. of Am., C/A No. 3:90-2586 (D.S.C. May 15, 1995) (ordering, at the request of the parties, that two earlier orders granting partial summary judgment, totaling 160 pages, be vacated as a condition of settlement. These orders resolved thitherto unresolved insurance coverage questions on a total of eight different insurance policies issued over a period of twenty years, and involved over fifteen different coverage and exclusion issues applying the law of New York and New Jersey.).

> Cease drafting and not issue a written opinion memorializing an oral ruling that simply denied a motion to dismiss for failure to state a claim.[15]

In addition, there are court orders on the dockets sealing the settlement terms in cases where:

> A child was killed while riding an allegedly defective go-cart which resulted in a settlement of $1.4 million;[16]
>
> An allegedly defective pharmaceutical, in widespread use in the United States, resulted in the death of a patient;[17]
>
> A major pharmaceutical chain misfilled a prescription, resulting in personal injury to the customer;[18]
>
> A large cosmetic company settled a claim of race discrimination filed by one of its employees for a substantial sum.[19]

Perhaps the most striking example of the lengths to which litigants will go to obtain the court's imprimatur on a confidential settlement occurred in a case that had been pending on my docket for six years. That case, *Johnson v. Collins Holding Corp.*,[20] involved claims under the Racketeer Influenced and Corrupt Organizations Act against most of the operators of South Carolina's $3 billion video poker industry. The case, which ultimately resulted in the demise of the video

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15. *See* Craps v. Jim Walter Homes, C/A No. 3:94-3285 (D.S.C.). The court was told that a condition of the settlement was that the court *not* complete work on an order that simply reduced to writing an earlier oral ruling that allowed a case involving an unresolved and hotly disputed issue of lender liability in South Carolina to go forward.

16. *See* LeRoy Irby *ex rel.* Estate of Chauncy L. Irby v. Ken-Bar Mfg. Co., C/A No. 6:01-0718 (D.S.C. Mar. 19, 2001). Although the order approving the settlement is sealed, the petition for court approval is not, for some reason, thereby disclosing the amount of the settlement. The defendant in the case still markets several types of go-carts, although it is impossible to tell from the court record whether the model of go-cart involved in the case is still on the market.

17. *See* Wayne S. Lown *ex rel.* Estate of Jeremy A. Lown v. Eli Lilly & Co., C/A No. 3:01-3674 (D.S.C. Sept. 13, 2001).

18. Davis v. Revco Discount Drug Ctr., C/A No. 01-CP-05-90 (S.C. 2d Jud. Cir. (Bamburg)).

19. This case was recounted to me by one of my former law clerks, who represented the plaintiff. As part of the settlement, she consented not to publicly discuss the resolution of the case and not to represent any additional plaintiffs against the defendant in that case. For these reasons, I am not at liberty to identify the case here. It should be noted that to the extent a settlement agreement requires an attorney to agree not to use information learned during the representation of a party in later representation against the opposing parties, or a related party, the agreement may well be unethical. *See* ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 417 (2000). Consent orders containing such a provision, therefore, seek to have the court approve unethical conduct.

20. C/A No. 3:97-2136 (D.S.C.).

poker industry in South Carolina,[21] involved over one thousand docket entries and 191 court orders. The case evoked intense interest in the news media in South Carolina and was the subject of a 165-page law review article.[22] Prior to settlement, the case went to the Supreme Court of South Carolina twice on certified questions of state law and once to the United States Court of Appeals for the Fourth Circuit.

Shortly before the scheduled trial when the first group of plaintiffs reached a compromise monetary settlement with the defendants, the attorneys requested a conference in my chambers. At that conference, the parties asked if I would be amenable to entering an order approving the settlement and ordering the parties not to disclose the terms of the settlement. I responded that their timing could not have been worse: Our court's proposed local rule placing limits on court-ordered secrecy had been pending for about three months, prompting a national debate on the subject and focusing attention on the practice in the state and federal courts of South Carolina. Moreover, the *Johnson v. Collins Holding Corp.* case was the most closely-watched case, by the news media, at least, that I had presided over during my years on the bench. Finally, and no less importantly, *Johnson v. Collins Holding Corp.* was not a class action and the parties were all alive and *sui juris*. In short, there was no legal requirement that I "approve" any settlement, much less order that the settlement papers be sealed. I declined and the case settled in any event.[23]

Closely related to the issue of court-ordered secrecy associated with the settlement of civil actions is the question of litigants who seek to file discovery materials or exhibits "under seal" so that the documents, although available to the court and the parties associated with the case, will not be available to the general public. Unlike secret settlements, there is a fairly well-developed body of law in the Fourth Circuit and elsewhere on the procedures to be followed when litigants attempt to file documents under seal. Generally, some type of public notice of the request to file documents under seal is required, followed by a hearing and a court order making express findings as to why sealing is necessary and explaining why any lesser alternatives will not suffice.[24]

Unfortunately, these well-defined rules for sealing court documents are sometimes more honored in the breach than in the observance. Many lawyers, and occasionally judges, assume all that is required for the sealing of discovery and other documents filed with the court is a simple directive from the attorney (or more

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21. *See* R. Randall Bridwell & Frank L. Quinn, *From Mad Joy to Misfortune: The Merger of Law and Politics in the World of Gambling*, 72 MISS. L.J. 565, 571 (2002) ("[I]t was a private lawsuit [*Johnson v. Collins Holding Corp.*] that finally publicized the problems resulting from South Carolina's experiment with unlimited and unregulated gambling . . and that led to the state's eventual abolition of gambling.").

22. *Id.*

23. Ultimately, all defendants settled and none of the settlements was sealed.

24. *See, e.g.*, Ashcraft v. Conoco, Inc., 218 F.3d 288 (4th Cir. 2000) (reversing a contempt order because notice of sealed settlement was not sufficient); *In re* Knight Publ'g Co., 743 F.2d 231, 235 (4th Cir. 1984) (stating that the district court "should state the reasons for its decision to seal . . . and the reasons for rejecting alternatives.").

commonly, the courier for the attorney) filing the documents to the intake deputy in the Clerk of Court's office.[25]

A. Local Rule 5.03: Filing Documents Under Seal

In an effort to establish clear and workable procedures for filing documents under seal and, perhaps more importantly, to educate the bar about the case law regarding sealing, the judges of the United States District Court for the District of South Carolina in August 2001 adopted Local Rule 5.03.[26] This rule essentially

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25. Appellate courts also support the sealing of discovery documents in a close case. For example, in *In re Policy Mgmt. Sys. Corp.*, Nos. 94-2254 & 2341, slip op. 2486 (4th Cir. Sept. 13, 1995), the Fourth Circuit reversed the district court's determination that certain allegedly "smoking gun" documents could not be filed with the court under seal. Ironically, five years later, that same defendant was back before the same district court judge, in an unrelated case, defending against similar allegations of misconduct. *See In re* Policy Mgmt. Sys. Corp., C/A No. 3:00-130 (D.S.C.).

26. D.S.C. LOCAL R. 5.03. The full text of the 2001 version of Local Rule 5.03 is as follows:

> *Filing Documents Under Seal.* Absent a requirement to seal in the governing rule, statute, or order, any party seeking to file documents under seal shall follow the mandatory procedure described below. Failure to obtain prior approval as required by this Rule shall result in summary denial of any request or attempt to seal filed documents. Nothing in this Rule limits the ability of the parties, by agreement, to restrict access to documents which are not filed with the Court. See Local Civil Rule 26.08.
>
> (A) A party seeking to file documents under seal shall file and serve a "Motion to Seal" accompanied by a memorandum. See Local Civil Rule 7.04. The memorandum shall:
>
> (1) identify, with specificity, the documents or portions thereof for which sealing is requested;
>
> (2) state the reasons why sealing is necessary;
>
> (3) explain (for each document or group of documents) why less drastic alternatives to sealing will not afford adequate protection; and
>
> (4) address the factors governing sealing of documents reflected in controlling case law. *E.g.*, *Ashcraft v. Conoco, Inc.*, 218 F.3d 288 (4th Cir. 2000); and *In re Knight Publishing Co.*, 743 F.2d 231 (4th Cir. 1984). A non-confidential descriptive index of the documents at issue shall be attached to the motion.
>
> A separately sealed attachment labeled "Confidential Information to be Submitted to Court in Connection with Motion to Seal" shall be submitted with the motion. This attachment shall contain the documents at issue for the Court's in camera review and shall not be filed. The Court's docket shall reflect that the motion and memorandum were filed and were supported by a sealed attachment submitted for in camera review.
>
> (B) The Clerk shall provide public notice of the Motion to Seal in the manner directed by the Court. Absent direction to the contrary, this may be accomplished by docketing the motion in a manner that discloses its nature as a motion to seal.

codifies the existing case law on the subject. This local rule was noncontroversial and has worked well.

In 2003 the district court added a refinement to Local Rule 5.03, promulgating a standardized protective order that will be accepted and entered by the court upon agreement of the parties. Many boilerplate protective orders routinely submitted to judges for approval contain language that is not in conformity with the sealing requirements of Local Rule 5.03 (notice, hearing, findings). These orders generally provide that documents produced between the litigants during discovery will not be disclosed by the parties or the attorneys to persons outside the litigation. Although these orders often provide for "blanket" confidentiality of all documents produced, no public interest is implicated because discovery is not filed with the court until it is necessary to do so in connection with a motion or a trial.[27]

It is when documents *are* filed with the court that the language of attorney-prepared or pattern protective orders sometimes runs afoul of Local Rule 5.03 and related case law. For this reason, judges must scrutinize consent protective orders submitted by the parties to ensure that they comply. A standardized protective order, when used by the parties, will relieve judges of the obligation to examine each and every word of the attorney-prepared order. Nothing in Rule 5.03 prohibits the parties from submitting a nonstandardized protective order (assuming, of course, it calls for compliance with the procedural sealing requirements of Local Rule 5.03), but parties who submit to the court a standardized protective order will benefit from a safe harbor of sorts: The standardized order will most always meet with the court's approval.[28]

B. Confidentiality Associated with Settlements: Local Rule 5.03(c)

In July 2002, the judges of the South Carolina federal court promulgated for public comment an amendment to Local Rule 5.03, denominated as 5.03(c), which was designed to address the problem of over-utilization of court-ordered secrecy associated with the settlement of civil cases. Eschewing nuanced approaches attempted by other jurisdictions, primarily through legislative enactments, that bar court-ordered secrecy in cases affecting "the public interest" or "public safety," the South Carolina federal district's variant of the rule reads simply: "No settlement agreement filed with the court shall be sealed pursuant to . . . [Rule 5.03(c)]."[29]

As the proponent of our rule change on secret settlements, I was mildly surprised when the court adopted an antisecrecy rule that was much broader than I had proposed, especially since the same court (with only three different members)

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27. Unlike the practice in most state courts, discovery in the federal court system is generally not filed with the court. *See* FED. R. CIV. P. 5(d) (providing that discovery material is not filed with the court until the materials are used in the proceeding or the court orders filing).

28. A copy of the District of South Carolina's standardized order is attached to this Article in Appendix A.

29. D.S.C. LOCAL R. 5.03(c).

had rejected a similar proposal by me in 1994.[30] My proposed Rule 5.03(c), presented to the court in 2002, would have affected only a limited number of cases. It read:

> No documents (including court orders) may be sealed in this district if the documents contain information concerning matters that have a probable adverse effect upon the general public health or safety, or the administration of public office, or the operation of government.[31]

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30. My 1994 rule change proposal garnered exactly one vote—my own.

31. Letter from Joseph F. Anderson Jr., Chief Judge, U.S. District Court for the District of South Carolina, to the twelve South Carolina U.S. District Judges (July 11, 2002) (on file with author). The letter read as follows:

The Honorable C. Weston Houck
The Honorable G. Ross Anderson, Jr.
The Honorable David C. Norton
The Honorable Dennis W. Shedd
The Honorable Henry M. Herlong, Jr.
The Honorable Cameron M. Currie
The Honorable Patrick Michael Duffy
The Honorable Margaret B. Seymour
The Honorable Terry L. Wooten
The Honorable Sol Blatt, Jr.
The Honorable Matthew J. Perry, Jr.
The Honorable Falcon B. Hawkins

In re: Court-Ordered Secrecy Agreements

Dear Judges:

I have had several quiet days this week and thus have had the opportunity to look at a lot of materials regarding court-ordered secrecy agreements. I would like to summarize in this letter several things I have learned which I think suggest that our court should bar these agreements in our district. I would like to share them with you so that you can review them in advance of the next meeting.

- ❑ Court-ordered secrecy agreements adversely affect public safety . . . .
- ❑ Secrecy agreements, (which typically require the plaintiff's attorney to return all documents that have been produced and agree to never disclose the existence of those documents) perpetuate messy discovery battles. As I mentioned in an earlier letter, I went through an extremely difficult case involving documents buried in a giant warehouse and when the case settled, the defendant insisted that the documents be returned and never discussed. This means that the next judge who had such a case (involving, as I recall, a defective piece of logging equipment) might have to go through the same discovery nightmare that I did. This is a waste of judicial resources as well as an unnecessary and expensive burden on litigants.
- ❑ For a judge to sign an order requiring an attorney not to disclose information he or she has learned in representing a client may be condoning unethical conduct by the attorney. *See* ABA Standing Committee on Ethics and Professional Responsibility formal opinion No. 00-417 (a copy of which was previously provided to you).

. . . .

- ❑ One of my law clerks asked me why it was necessary to have a blanket rule in our court

While at first blush Rule 5.03(c), as adopted, may appear to be rigid and inflexible, admitting no exceptions, it must be read in conjunction with another local rule that provides an escape valve for cases in which a legitimate need for court-

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when each judge is free to simply reject secrecy agreements if he or she is opposed to them. Here is the problem with that: When the plaintiff's lawyer and the defendant's lawyer come to a judge after a long, contentious legal battle and announce to the judge that they have reached an amicable settlement whereby the plaintiff will receive, for example, $2 million for injuries which have rendered him a quadriplegic, contingent on the judge signing an order sealing the record and requiring the return of all documents, the judge is in a real quandary: If the judge wants to reject the secrecy agreement as a matter of principle, he or she may do so, and then the case will go to trial. If plaintiff then loses, the judge has cost that plaintiff a favorable settlement because the judge wants to promote openness in the court system. In other words, there is an incredible amount of pressure brought to bear on a judge when a favorable settlement is reached contingent on a secrecy agreement. If we outlaw them altogether (that is to say, if we take the secrecy agreement off the table as a bargaining chip), individual judges would avoid this quandary and its attendant risks.

- Last Friday I received a call from Chief Justice Jean Toal who had learned of my efforts on this matter and was interested in looking at the materials I have collected. After I sent them to her, she informed me that she intends to make a strong push at the state judges' judicial conference in August to outlaw secrecy agreements in state court. Although, no one can tell for certain, I suspect that if Jean Toal advances this matter with her usual resourcefulness, we will see this change occur on the state level. We thus have the opportunity to work in tandem with our state court brothers and sisters just as we did approximately one year ago on our rule change regarding Rule 403 for law clerks.

- Finally, I think that we should outlaw secrecy agreements because it's just the right thing to do. How many times have we heard that South Carolina is last on the lists where we should be first and first on the lists where we should be last? Here is a rare opportunity for our court to do the right thing, and take the lead nationally in a time when the Arthur Andersen/Enron/Catholic priest controversies are undermining public confidence in our institutions and causing a growing suspicion of things that are kept in secret by public bodies.

For all these reasons, I strongly think that our court should adopt a local rule barring secrecy agreements executed in connection with the settlement of a case involving public safety. My proposed rule (modeled loosely on the Florida rule) would read as follows:

> No documents (including court orders) may be sealed in this district if the documents contain information concerning matters that have a probable adverse effect upon the general public health or safety, or the administration of public office, or the operation of government.

With kind personal regards, I am,

Yours very truly,

Joseph F. Anderson, Jr.

JFA;JR: rdp

ordered secrecy can be demonstrated. Local Rule 1.02 provides that "[f]or good cause shown in a particular case, the court may suspend or modify any local rule." Read together, Local Rules 1.02 and 5.03(c) establish a *preference* for openness at settlement, while still preserving the ability of the presiding judge to seal a settlement when, for example, proprietary information or trade secrets need to be protected, or a particularly vulnerable party needs to be shielded from the glare of an otherwise newsworthy settlement.

I remain of the opinion that the more limited version of the rule that I proposed is all that was needed to address the problem that I perceived. There are some who defend the broader rule passed by our court because they believe that the rule, read together with the escape valve of Local Rule 1.02, achieves essentially the same result: The judges of our court will scrutinize more carefully, and quite possibly reject, requests to seal settlements in cases where court-ordered secrecy might have some deleterious effect on the public.[32]

How did it occur that a court that soundly rejected an antisecrecy proposal in 1994 did such an about-face and adopted a rule change in 2002 that was even broader than its proponent had suggested? As the Greek poet Hesiod said, "right timing is in all things the most important factor."[33]

In the spring of 2002, *The State*, South Carolina's largest daily newspaper, ran a three-part series by news columnist John Monk on medical negligence litigation in South Carolina. The last of these articles focused exclusively on court-ordered confidentiality that was associated with the settlement of virtually all medical negligence cases in the South Carolina state courts.[34] The Monk article pointed out the general belief that a small number of physicians are involved in a disproportionately high number of negligence cases. It also noted that identifying these physicians is difficult because of the behavior of judges who obligingly seal the settlement and restrict access to information about the case.

Near the same time *The State* ran its articles, a national furor erupted over confidentiality orders allegedly entered in early cases involving motorists injured by tires manufactured by Bridgestone/Firestone, as well as Goodyear, and children abused by Catholic priests. According to news articles, court orders in some of the early cases kept the public in the dark about existing and ongoing threats to public

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32. Our court's proposed rule, but not the escape valve of Local Rule 1.02, was widely publicized in the news media and in legal journals. As a result, the proposed rule, which appeared on its face to be the most draconian of any rule enacted in any jurisdiction thus far, generated a national debate on the issue of court-ordered secrecy generally. The publicity and debate probably would not have been as intense if my milder version of the rule had been put forth by the court. I believe this national debate was beneficial if for no other reason than it brought the issue to the forefront, and perhaps made all participants in the administration of justice more sensitive to the issue of court-ordered secrecy.

33. Hesiod, *The Theogony*, l.1, *available at The Online Medieval & Classical Library*, http://sunsite.berkeley.edu/OMACL/Hesiod (last visited Apr. 2, 2004).

34. John Monk, *Medical Mistakes Kept Secret*, THE STATE (Columbia, S.C.), June 18, 2002, at A1. Since a doctor and patient generally live in the same state, there is rarely diversity of citizenship in medical negligence cases; hence, the vast majority of these cases are litigated in state courts.

safety, resulting in more people being injured or killed when riding on defective tires and more children being abused by priests with whom they associated.[35]

The publicity associated with these developments provided the impetus needed to pass the antisecrecy provision of Local Rule 5.03(c). On July 31, 2002, South

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35. The following excerpts are typical of the many news articles castigating the judicial system around the country during the relevant time period: "Some victims of accidents involving Ford and Firestone have settled their lawsuits confidentially. Many state judges routinely seal product-liability lawsuits, making it difficult for federal officials—or anyone else—to spot trends." Stephen Power, *Agency Probes of Auto Defects are Hampered*, WALL ST. J., Aug. 23, 2000, at A3.

> [Secret settlements are] a practice that [have] become commonplace in the past 20 years, in which the amount of settlements are hidden, as well as details of a product's dangers. Companies limit bad publicity, victims get larger settlements, and busy court dockets are cleared.
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> . . . .
>
> [A] West Virginia University football player [] died in March 1997 when the tread of a Firestone ATX tire separated on his Explorer, causing the vehicle to roll over. Georgia attorney Rowe Brogdon found dozens of similar lawsuits, but attorneys couldn't talk about their cases because of confidentiality agreements. In some cases, judges order the return of documents to Ford and Firestone.
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> . . . .
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> The protective orders on documents, combined with confidentiality agreements in settlements, allowed Ford and Firestone to maintain publicly that there were no known problems with the tires even as they continued to settle cases across the country for millions of dollars.

Ron French, *Tire Death Secrets Sought*, DETROIT NEWS, Sept. 19, 2000, at 1A.

> [L]awyers say protective orders have snuffed out early warning signals about dangerous products, posing a threat to public health and forcing injured plaintiffs to litigate their cases without the benefit of documents that have been sealed in prior cases. Over the years, protective orders have sealed information—at least temporarily—in liability cases involving such products as breast implants, Bic lighters, all-terrain vehicles and Agent Orange.

Richard B. Schmitt, *Critics Say Courts Seal Too Much Data*, WALL ST. J., Oct. 4, 1995, at B1.

> A Connecticut Superior Court judge accused his state's judiciary this week of longstanding complicity in the Diocese of Bridgeport's efforts to keep hidden from the public the extent of clergy sexual abuse, including a church "cover-up," which the judge said is "at the heart of the scandal."
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> . . . .
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> In extraordinary language aimed at the Connecticut Appellate Court, which has delayed his order that seven boxes of secret documents be made public, [Judge Robert F.] McWeeny declared that it is "indefensible morally as well as legally" to keep the documents under court seal. Even the delay, he said, "precludes any timely vindication of any public right to access this compelling information."
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> . . . .
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> The Bridgeport Diocese, he continued, "though unsuccessful in nearly every legal claim it has asserted, has nonetheless for years shielded these materials from public review. Connecticut courts have facilitated this process . . . [by] sealing the files over the objections of the victims . . . ."

Walter V. Robinson, *Connecticut Courts Helped Hide Abuse, Judge Says*, BOSTON GLOBE, June 14, 2002, at A1.

Carolina district judges unanimously voted to submit the rule for public comment.[36]

Reaction to our proposed rule was swift and the rhetoric was heated. Approximately two hundred pages of commentary were filed with the Clerk of Court's office. Generally speaking, insurance and business interests and defense attorneys opposed the rule. News media organizations, the organized plaintiffs' bar (but not necessarily all plaintiffs' lawyers individually), and public interest groups such as Common Cause and Ralph Nader's organization, Citizen Works, supported the proposed rule.[37] The debate contained in the public commentary revealed that the opposing camps were deeply divided with little hope of any middle ground alternative acceptable to both sides. Members of our court were either hailed as modern day Thomas Jeffersons[38] or criticized as neanderthals who would end the practice of law as we know it.[39]

After receiving and reviewing the comments of all interested parties, and after debate and discussion at a November 1, 2002 judges meeting, the South Carolina District Court adopted Local Rule 5.03(c) as promulgated. The vote was 8-2. Our court thus joined at least twenty other jurisdictions[40] that have adopted some form

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36. In addition to posting the proposed new rule on the District Court website and advertising in legal magazines, our court invited the presidents of five bar organizations in South Carolina, as well as three ethics professors from the University of South Carolina School of Law, to comment on the rule.

37. The responses were all posted on the website of the District of South Carolina and may be viewed at http://www.scd.uscourts.gov (last visited Apr. 2, 2004) (on file with author).

38. *See* E-mail from Kenneth G. Harper to Judy Matras, Deputy Clerk of Court, District of South Carolina (Sept. 2, 2002) (describing the court as "secur[ing] [its] name in history with the likes of Oliver Wendell-Holmes, Thomas Jefferson, and Teddy Roosevelt as a true protector of the people for the people, by the people") (on file with author).

39. One attorney has suggested that American soldiers have fought in the Mideast Gulf wars to prevent the type of privacy invasion an antisecrecy rule would bring about. Bill Ainsworth, *Business Lobbying to Kill Secret Settlements Bill*, THE RECORDER, May 15, 1991, at 1.

40. *See, e.g.*, ARIZ. REV. STAT. ANN., SUP. CT. R. 123 (West Supp. 2003) (governing public access to judicial records); ARK. CODE ANN. §§ 25-18-401 to -403, 16-55-122 (Michie 2002) (prohibiting the sealing of government documents and voiding agreements that restrict disclosures of environmental hazards); CAL. R. APP. P. 12.5, 56 (governing sealed documents on appellate review and stating procedures for appealing the trial court's ruling on sealing); CAL. CT. R. 243.1–243.4 (governing sealed records at trial); DEL. SUP. CT. R. ANN. 9(bb) (Michie 2003) (governing sealing of court records); DEL. CH. CT. R. 5(g) (governing sealing of court records); FLA. STAT. ANN. § 69.081 (West Supp. 2004) (prohibiting concealment of public hazards); GA. SUPER. CT. R. 21 (setting forth procedure for limiting access to court files); IDAHO CT. R. 32(f) (requiring least restrictive means for sealing documents and written findings by the court); IND. CODE ANN. § 5-14-3-5.5 (Michie 2001) (placing burden on proponent to establish that policy of openness is outweighed by factors favoring sealing); KY. REV. STAT. ANN. §§ 224.10-210, -440 (Michie 2002) (stating policy that records and hearings are open to the public); L.A. COUNTY SUPER. CT. R. 12.20 (disfavoring confidentiality agreements and protective orders); LA. CODE CIV. PROC. ANN. art. 1426 (West Supp. 2002) (governing protective orders); MASS. R. IMPOUNDMENT P. (requiring motion requesting documents and exhibits sealed be supported by affidavit); MICH. STAT. ANN. R. 8.105 (Law. Co-op. 1992) (prohibiting court from entering sealed order unless party files written motion, court makes written finding of good cause, and no less restrictive means are available); NEV. REV. STAT. ANN. § 41.0385 (Michie 2002) (stating claims against government agencies are public records); N.J. CT. R. § 4:10-3 (governing protective orders); N.Y. CT. R. §§ 216.1, 3103 (governing sealing of court records and protective orders); N.C. GEN. STAT.

of sunshine provision for their courts and became the first federal court to do so by local rule.

III. ARGUMENTS MADE BY THE CONFIDENTIALITY PROPONENTS

Those who favor the status quo (and therefore opposed Local Rule 5.03(c)) advanced a number of arguments—some of which may be easily dismissed and some of which merit more extended discussion.

A. "A Deterrent to Settlements"

Opponents of Local Rule 5.03(c) suggested that its adoption would discourage settlements, thereby flooding our already-overburdened court system with more trials than it can handle. The argument was based upon the somewhat illogical concept that if litigants could no longer attempt to cajole a judge into ordering a secret settlement, then the parties would necessarily opt for the most public of all resolutions—a trial before a jury in an open courtroom.

Statistics compiled since the implementation of Local Rule 5.03(c) easily refute this argument. In South Carolina, the judges in our district court actually tried two *fewer* cases in the twelve months following the promulgation of Local Rule 5.03(c) than they did in the immediately preceding twelve-month period.[41] Nor were litigants discouraged from filing in our federal court after 5.03(c) was adopted: Civil filings for the twelve-month period following Rule 5.03(c)'s adoption were up by 384 cases over the preceding twelve months.[42]

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§ 132-1.3(b) (2003) (prohibiting sealing of settlement document unless overriding interest overcomes policy of openness, and no other less restrictive means are available); OR. REV. STAT. § 30.402 (2001) (prohibiting sealing of settlement with governmental agency); SAN DIEGO COUNTY SUPER. CT. R. 11.6 (stating policy that confidentiality agreements and protective orders approved only when genuine trade secret or privilege protected); S.F. COUNTY SUPER. CT. R. 10.5 (disfavoring sealing of documents); TEX. R. CIV. P. § 76a(1) (requiring specific, serious and substantial interest clearly outweigh presumption of openness); VA. CODE ANN. § 8.01-420.01 (Michie 2000) (allowing materials covered by a protective order in personal injury and wrongful death actions to be voluntarily shared with attorney in a related action with permission of the court after notice and hearing); WASH. REV. CODE ANN. §§ 4.24.601, 611 (West Supp. 2004) (declaring public right to information regarding public health and safety). ROSCOE POUND INST., MATERIALS ON SECRECY PRACTICES IN THE COURTS (2000). *See generally* Doré, *supra* note 6 (suggesting a balancing approach to litigation confidentiality using the principle objectives of the right of public access to judicial proceedings).

41. E-mail from Sandy Roberson, Deputy Clerk of Court, U.S. District Court for the District of South Carolina, to Joseph F. Anderson Jr., Chief Judge, Federal District of South Carolina (Aug. 26, 2003) (on file with author).

42. *Id.* Civil filings for the twelve months preceding Local Rule 5.03(c) were 5,785, while filings for the next twelve months were 6,169, an increase of 6.6%. *Id.*

B. *"The Litigants Have Privacy Rights"*

Perhaps the most bogus of all contentions against the antisecrecy rule is the straw argument that litigants do not shed their constitutional right to privacy at the courthouse door.[43] The implication is that the antisecrecy rule somehow prevents the parties from agreeing *between themselves* to settle a case with both sides agreeing not to talk about the case. The parties had this right before Rule 5.03(c) was adopted, and they have it now.

Rule 5.03(c) addresses *court-ordered* secrecy, i.e., a settlement whereby the parties consent to an *order of the court* directing that the settlement, the court documents, or whatever else the parties agree upon, remain secret. It is one thing to say that the parties have the right, as they do, to agree upon secrecy *inter se*; it is quite another to suggest that there is some legal right to force a judge to sign an order requiring that the parties "hush up" on pain of contempt of court.[44]

In the month following adoption of Rule 5.03(c), I participated in four panel debates on the topic of "secret settlements." The opponents on the other side of the table, without fail, raised the so-called privacy issue as their principal argument. In each debate, no panelist on the other side of the issue would address the principal points made herein—that Rule 5.03(c) does not prevent private agreements on secrecy, but only government-enforced secrecy.

C. *"Under Existing Rules, Judges Do Not Have to Go Along with Court-Ordered Secrecy; Hence, the Rule is Not Necessary"*

This statement is a valid argument in opposition to Rule 5.03(c), but one that ignores the human dynamic that comes into play when judges are presented with consent secrecy orders.

Consider the following scenario, which is not unusual in the life of a trial judge. A judge is in his or her office, reviewing motions in limine filed in an upcoming civil trial that is scheduled to begin the following Monday and last three weeks. The lawyers in the case call to advise the judge that they need to see the judge in chambers with some good news. Upon arrival, they announce to the judge that they have reached a compromise settlement: The defendant will pay the plaintiff the sum of $1.75 million in exchange for a full release. The lawyers then say,

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43. *See, e.g.*, Miller, *supra* note 7, at 466 ("Litigants do not give up their privacy rights simply because they have walked voluntarily or involuntarily, through the courthouse door.").

44. Attorney Daniel A. Speights of Hampton, South Carolina once told me that when he was a law clerk to state Circuit Judge William Rhodes, the judge often remarked that it seemed odd to him that lawyers assumed that when they presented an order to the judge consented to by the attorneys for both sides, the judge *had* to sign the order simply because both lawyers had already signed it. Judge Rhodes was right: A judge is under no obligation to rubber-stamp an order merely because it is a consent order.

> We are delighted we were able to come to terms and amicably settle this case. You can stop pouring over those motions in limine, and you now have three weeks to devote to those upcoming drug conspiracy trials. Oh, by the way, there is just one more thing we agreed upon to make this settlement work. We have prepared this order, to which all the parties have consented, that simply protects everybody involved.

The judge reads the consent order which provides for:

> Total confidentiality on the terms of settlement, to be enforced by the court's contempt power;
>
> A return by the plaintiff of all documents produced during discovery;
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> A prohibition on plaintiff's counsel and plaintiff discussing the case; and
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> The vacating of substantive orders entered in the case, thereby removing this precedent from the record.[45]

If the judge signs this order, everyone will be happy: The plaintiff recovers a

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45. The practice of vacating previously entered orders to effectuate a settlement is, in my view, a problem related to court-ordered secrecy, but one that is generally beyond the scope of this Article. Suffice it to say that, like court-ordered secrecy, vacatur on consent represents a troubling trend in civil litigation. Just as with secret settlements, a form of "pecuniary sweetener" is used to facilitate the erasing of a part of the public court record.

To give just one example, in 1992, I presided over a nonjury insurance coverage dispute dealing with the duty of four different insurers to defend and indemnify a contractor that installed asbestos in several buildings at the University of South Carolina during the 1960s and 1970s. My opinion finding partial coverage in the case—which involved four insurers who issued eight policies over a period of twenty years, each containing fifteen exclusions, requiring me to predict the law of two different states (New York and New Jersey)—produced 160 pages of analysis. Univ. of S.C. v. Royal Ins. Co. of Am., C/A No. 3:90-2586-17 (D.S.C. May 15, 1995). While the appeal was pending, the parties settled, but only on the condition that I vacate my opinion. As a newcomer to the bench, I went along, issuing a one-sentence order undoing all of the earlier work I had done. *Id.* There were potentially more than two dozen ways the case could be reversed and I reasoned that I was saving the court of appeals, and quite possibly myself, additional work.

After seventeen years on the bench, I no longer go along with consent vacatur requests. I agree with the sentiments of Chief Judge Sherman Finesilver: "Vacatur allows disappointed litigators effectively to rewrite history. [It] allows them to control the direction and content of jurisprudence—to weed out the negative precedent and preserve the positive—and create an artificially weighty and one-sided estimate of what comprises 'the case law.'" Benavides v. Jackson Nat'l Life Ins. Co., 820 F. Supp. 1284, 1289 (D. Colo. 1993)." For a thorough examination of the different views on the use of vacatur, see Resnik, *supra* note 3.

handsome sum, both lawyers get paid, the defendant gets its court-ordered secrecy, the judge has one less case to try, and there is no one around to object to the secrecy order.

But suppose the case involves an allegedly defective product and the judge is aware that the product is still on the market, or a teacher who has molested a child and the judge knows that the teacher is still in the classroom, or a telemarketer who has swindled an elderly couple out of their life savings and the judge knows that the telemarketer is still in operation. What does the judge do then?

Critics of our rule say that the court should, and will, always do the right thing and look out for the public interest by refusing to sign the secrecy order. But if the judge refuses, the case then goes to trial and a potentially deserving plaintiff may recover nothing because the judge has rejected the settlement.

In other words, judges face incredible pressure to go along with court-ordered secrecy in the heat of battle.[46] As Judge Judith McConnell of the San Diego, California, Superior Court told interviewer Lynn Sherr on the ABC news magazine *20/20*:

> In the olden days, I would sign an order that stipulated that the moon was made out of cheese if the lawyers came in and asked me to sign it and we routinely signed orders because they didn't create any work for us and they resolved issues and there was no one around asking that anything else be done.[47]

The surface water contamination case referred to in Part II is illustrative.[48] The case involved over 350 plaintiffs who contended that they were injured when the defendant deposited polychlorinated biphenyls (PCBs) into Lake Hartwell, a 56,000 acre public lake on the Savannah River in upstate South Carolina. The case included traditional property value diminution claims as well as many personal injury claims asserting the plaintiffs developed cancer and other diseases as a result of being exposed to the lake water.

The first judge assigned to the case was appointed to the court of appeals. The judge who inherited his docket handed it off to me shortly after I was appointed. The case promised to be a daunting task for a neophyte judge; it had been pending for three years and the trial was predicted to last six months.

After receiving the case, I conducted a summary jury trial in front of an

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46. *See* David Luban, *Settlements and the Erosion of the Public Realm*, 83 GEO. L.J. 2619, 2649 (1995) (observing "the basic scenario" under which "the court, eager to close the case, mindful that 'facilitating the settlement' . . . is a stated objective . . . under Rule 16 of the Federal Rules of Civil Procedure . . ., and understanding that the secrecy stipulations are the sine qua non for the plaintiff achieving a generous settlement, or perhaps any settlement at all, seals the records of the case").

47. *20/20: The Secrets They Keep* (ABC television broadcast, Aug. 29, 1992) (on file with author).

48. Whitfield v. Sangamo Weston, Inc., C/A No. 6:84-3184 (D.S.C.).

advisory jury in an effort to provide a catalyst for settlement. When the advisory jury quickly returned a verdict for the defendant, the plaintiffs' settlement demand was reduced and the parties engaged in earnest settlement negotiations. Ultimately, the parties structured a novel arrangement: The defendant would pay $3.5 million into a fund that would be used to set up a medical monitoring and primary medical care program for all 350 plaintiffs who lived near the lake. The bulk of the settlement funds was given to the Medical University of South Carolina, who agreed to enter into a contract with a physician with an office near the plaintiffs. Under this contract, the physician would furnish free primary medical care to all the plaintiffs for the duration of their lives. Also, the Medical University, working with the physician, would conduct epidemiological studies on all the plaintiffs and monitor their medical condition in an effort to learn more about the long-term health effects of exposure to PCBs. A small amount of the settlement money would be used for a per capita distribution to each plaintiff.

The plan had all of the markings of a "win/win" settlement: The plaintiffs received free medical care for life, plus a monetary settlement; the defendant earned considerable good will for providing for plaintiffs' medical needs; and the Medical University and the local physician received accolades for spearheading such an innovative program.

Because the group of plaintiffs included some minors and others whose settlements required court approval, it was necessary for me to review and approve the settlement. During the approval process, I was told that court-ordered secrecy at settlement, and a return of all "smoking gun" documents, was a non-negotiable prerequisite to the entire settlement: If I did not go along, the carefully crafted package would fall apart and the case would move forward to a six-month trial. Moreover, inasmuch as the summary jury had already returned a verdict for the defendant after less than thirty minutes of deliberation, it was entirely possible that the plaintiffs would recover nothing at the conclusion of the trial and all subsequent appeals. As a judge with six months experience on the bench and other difficult cases awaiting me, I went along with the request for court-ordered secrecy.

At a conference of Chief United States District Judges in Washington on April 30, 2003, a United States District Judge (who I will not identify except to say that she is not from the Massachusetts area) told me that she never signs secrecy orders because of an experience in her past. She told me that twenty years ago, she was assigned a case involving allegations of sexual abuse by a church leader. She went along with a request to order that the case, or some aspect of it, be kept secret. She was told at the time that the alleged perpetrator was permanently leaving her area. She later learned that the church had actually transferred him to a distant region and that he later returned to her district and died of AIDS. She says that she has regretted her decision for twenty years and that she will never sign another consent secrecy order.

Judges who have not had such an enlightening experience may not have the will to reject consent secrecy orders when they are not appropriate. An antisecrecy rule takes court-ordered secrecy off the table as a bargaining chip. It might seem odd

to suggest that life-tenured federal judges are as vulnerable as Ulysses, who had to tether himself to his ship so that he would not be lured away by the sirens' temptations, but the simple fact is that judges all too often yield to expediency in order to settle a case.[49] The sealed settlements noted at the beginning of this Article are merely representative examples. There are many others.[50]

D. "Secrecy Has a Market Value"

Perhaps the most bizarre argument against Local Rule 5.03(c) was the one voiced by some plaintiffs' lawyers who said that court-ordered secrecy gives them the opportunity to leverage a little more money out of the defendant at settlement time.[51] For example, a personal injury case is worth $600,000 for a routine settlement, but the settlement value goes up to $750,000 if the plaintiff and his counsel consent to a gag order. According to *Time* magazine, the early Catholic priest controversies involving pedophilia proceeded in a "culture of secrecy."[52] In the early cases, "[I]f a victim finally sued, the strategy was to admit nothing, *buy silence*, settle out of court and seal the deal with a confidentiality contract."[53] As plaintiffs' lawyer Allan Kanner told a major publication after one of his settlements, "They [the defendants] paid my client a ton of money to shut up."[54]

What this means is secrecy—*court-ordered* secrecy, *government-enforced* secrecy—is a commodity that has a market value and is bought and paid for, not just

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49. One federal judge has even suggested that a neutral ombudsman be utilized to determine secrecy issues, given the courts' "conflict of interest" in securing settlements and clearing their dockets. Jack B. Weinstein, *Ethical Dilemmas in Mass Tort Litigation*, 88 NW. U. L. REV. 469, 517 (1994).

50. The reader will observe that some of the confidential settlements referred to in Part II of this Article are cases that I have presided over. *See supra* notes 12 through 15 and accompanying text. In my defense, I would point out that these cases came earlier in my career when I labored under the belief that the overriding goal of judges was to settle cases. My views on the desirability of settlement have evolved. Although I agree that our system depends heavily on compromise settlements, I share the views espoused by Professor Judith Resnik of Yale Law School who believes there is an overemphasis on settlement. *See* Judith Resnik, *Trial as Error, Jurisdiction as Injury: Transforming the Meaning of Article III*, 113 HARV. L. REV. 924 (2000). Professor Resnik finds it ironic that members of a profession whose title is "trial judge" often view those cases that go to trial as "failures" of the system. *Id.* at 925–26. Fifth Circuit Appellate Judge Patrick E. Higginbotham has voiced similar sentiments. Patrick E. Higginbotham, *So Why Do We Call Them Trial Courts?*, 55 SMU L. REV. 1405, 1423 (2002) ("Ultimately, law unenforced by courts is no law. We need trials, and a steady stream of them, to ground our normative standards—to make them sufficiently clear that persons can abide by them in planning their affairs—and never face the courthouse—the ultimate settlement. Trials reduce disputes, and it is a profound mistake to view a trial as a failure of the system.").

51. *See* Kate Marquess, *South Carolina Moves Toward Squelching Secrecy*, 30 A.B.A. J. E-REPORT 6 (2002) ("'[The proposed rule is] not good for the individual plaintiff,' says Richard A. Harpootlian, a civil litigator in Columbia, [South Carolina]. Harpootlian says a case may be worth more if the plaintiff agrees to settle quietly. 'That's an element that I use to negotiate the settlement.'").

52. Johanna McGeary, *Can the Church Be Saved?*, TIME, Apr. 1, 2002, at 29, 30.

53. *Id.* at 31 (emphasis added).

54. Editorial, *Debate: Open Court Records to Protect Public*, USA TODAY, Mar. 16, 1989, at 6A.

under the judge's nose, but with the judge's complicity. In my view, courts in civil cases operate to seek the truth and to right wrongs; they do not exist to participate in an exercise where the judge's signature is for sale.[55]

E. "The Parties May Evade the Underlying Purpose of the Rule by Simply Agreeing to Secrecy Between Themselves with No Court Involvement"

Although it is true that litigants may always settle a case on the basis of contractual secrecy, a so-called "contract of silence," this is not a strong argument against adoption of Local Rule 5.03(c). As noted previously, nothing in 5.03(c) prohibits bilateral secrecy covenants between the litigants. Indeed, in my view, there is no way a rule could legitimately ban such agreements.

The evil that 5.03(c) is designed to address is *court involvement* in the business of enforcing secrecy. Litigants, however, are often discontent to walk away with a mere contract not to talk. They want the judge's signature, and the corresponding contempt power of the court, to legitimize their conduct and to have assurance that a violation will be summarily dealt with by the court.[56]

Litigants may want court-ordered secrecy for other, less pure, motives as well. A few examples follow.

In an article entitled *System Helps Hide Hospitals' Mistakes*, Durham (NC) *Herald-Sun* writer Jim Shamp reports that "closed-door settlements may allow hospitals and doctors to deny culpability and circumvent error-reporting requirements of regulatory agencies."[57] Shamp explains that hospitals are required to report to the Joint Commission on the Accreditation of Healthcare Organizations (JCAHO) "all 'sentinel events,' meaning any unexpected outcome resulting in a patient death or permanent loss of function."[58] Shamp contends that underreporting to the JCAHO is rampant. Since the sentinel event reporting requirements started in 1995, there have been 1,959 events reported. Meanwhile, a 1999 report by the

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55. Judicial confirmation that secrecy has a market value was recently provided by the United States Tax Court. In *Amos v. Commissioner*, T.C.M. 2003-329 (2003), a tax dispute arose from an incident involving an assault by a professional basketball player (Dennis Rodman) on a sports photographer during a game. The player paid the photographer $200,000 to settle the case and the agreement included typical secrecy provisions.

The IRS Commissioner attempted to treat the entire amount of the settlement as taxable income on the ground that the IRS believed that there had been little, if any, actual physical injury to the photographer. The Tax Court disagreed with the Commissioner's determination that all of the settlement was income, but it held that the unspecified portion of the settlement that was paid for secrecy was taxable income. The court valued the secrecy part of the settlement at $80,000 and ordered the photographer to include that amount in his taxable income of the year in question. *Id.*

56. As Professor Laurie Kratky Doré has observed, "many litigants are not content to rely upon contractual confidentiality clauses and additionally seek judicial imprimatur of their compromise, either by filing it for approval with the court or requesting that it be otherwise embodied in a court order containing confidentiality or sealing provisions." Doré, *supra* note 6, at 384–85.

57. THE HERALD-SUN, Mar. 9, 2003, at A1.

58. *Id.*

National Academies of Science's Institute of Medicine entitled "To Err is Human" linked as many as 98,000 deaths per year to medical errors in United States hospitals. Shamp's premise is that some institutions may not report because the institutions hide behind gag orders issued by judges—orders that they invited the judges to sign.[59]

A similar phenomenon may be occurring in the products liability area. The Consumer Product Safety Act requires that the manufacturer of a consumer product self report to the Consumer Product Safety Commission (CPSC) when the product is the subject of three verdicts or settlements arising out of claims for death or severe bodily injury.[60] Between 1991 (when the reporting requirement began) and 2002, there have been 551 reports to the CPSC.[61] During this same period of time, there have been 156,085 product liability lawsuits filed in the federal court system alone.[62] Of course, it is possible, though unlikely, that the vast majority of those cases were resolved with a verdict for the defendant. It is also possible that massive under-reporting is occurring because litigants hide behind gag orders issued by the court at settlement.

I recall at least one occasion where the attorneys in an excessive force case against law enforcement officers asked me to seal the settlement in the case, notwithstanding the fact that the State of South Carolina has a policy against sealed settlements.[63] These attorneys candidly admitted that they were seeking to gain an advantage for the city the officers worked for in later litigation. Specifically, political subdivisions such as municipalities may not be held liable for constitutional violations under 42 U.S.C. § 1983 unless the plaintiff can prove a "pattern or custom" of such conduct.[64] The attorneys apparently believed that "sealing" the

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59. *Id.*

60. 15 U.S.C. § 2084 (2000).

61. E-mail from Marc J. Schoem, Director, Recalls and Compliance Division, Office of Compliance, CPSC, to Joseph F. Anderson Jr., Chief Judge, U.S. District Court for the District of South Carolina (Aug. 13, 2003, 10:24 am) (on file with author). "[T]he U.S. Consumer Product Safety Commission administers section 37 of the Consumer Product Safety Act [15 U.S.C. §§ 2051–2085], Section 37 requires manufacturers of consumer products to report information about settled or adjudicated lawsuits during [any given] two year periods. The Commission [has promulgated] a rule interpreting the requirements of section 37 at 16 C.F.R. Part 1116. The first reporting period was January 1, 1991 through December 31, 1992 . . . ." Since 2002, 551 reports have been received under section 37. *Id.*

62. Memorandum from Sandy Roberson, Deputy Clerk of Court, U.S. District Court for the District of South Carolina, to Joseph F. Anderson Jr., Chief Judge, Federal District of South Carolina (Aug. 12, 2003) (relaying information from the Statistics Division of the Administrative Office of the United States Courts) (on file with author). This figure does not include asbestos cases, which are quantified separately. *Id.*

63. *See infra* note 85.

64. Monell v. Dep't of Soc. Servs., 436 U.S. 658, 694 (1978) (holding "a local government may not be sued under § 1983 for an injury inflicted solely by its employees or agents. Instead, it is when execution of a government's policy or custom, whether made by its lawmakers or by those whose edicts or acts may fairly be said to represent official policy, inflicts the injury that the government as an entity is responsible under § 1983.").

settlement would prevent the actions of the officer in that case from being used in later litigation to establish a custom on the part of the city.

Scott Ritter, a former arms inspector with the United Nations team charged with looking for weapons of mass destruction in Iraq in the years leading up to the 2003 conflict known as *Operation Iraqi Freedom*, created quite a stir in January 2003 when he declared there was no evidence that the Iraqis had weapons of mass destruction and the war was a huge mistake. In the midst of this publicity, reports surfaced that Ritter had been arrested in 2001 for trying to lure a teenage girl he had met on the internet. When asked about the incident by CNN reporter Aaron Brown he replied,

> Aaron, we're dealing with a case that has been dismissed and the record has been sealed by a judge's order. And I'm obligated, both ethically and legally, not to talk about that case.[65]

Reporter Brown persisted:

> Scott, we spent a fair amount of time today looking at New York law on this. There is nothing in a sealed case, zero, that prevents you from talking about it. The point of the seal is to protect you from the state, not to protect the state from you.
>
> You can choose not to talk about the specifics of this. That's always the right of the guest. But . . . I'm not sure what the ethical question is . . . talking about it. And none of our lawyers can find the legal one, OK?[66]

After continuing to refuse to discuss the case, Ritter concluded by saying, "[T]he file was sealed. End of story."[67]

Similarly, entertainer Michael Jackson was once the defendant in a case involving allegations of sexual misconduct with a thirteen-year-old boy. The case was settled with an agreement of confidentiality. When later asked about the charges, Jackson said that he was "not allowed to talk about [it] by way of law."[68]

As American citizens, Ritter and Jackson have an absolute right to privacy—they can tell any interviewer that they would prefer not to discuss

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65. *CNN NewsNight with Aaron Brown* (CNN television broadcast, Jan. 22, 2003), *available at* http://www.worldnetdaily.com/news/article.asp?ARTICLE_ID=30634 (last visited Apr. 2, 2004) (on file with author).

66. *Id.*

67. *Id.*

68. *20/20: Living with Michael Jackson* (ABC television broadcast, Mar. 6, 2003).

allegations about their past conduct.[69] But do they have a *right* to a court order compelling confidentiality, thereby enabling them to convey the misleading impression that they would be delighted to discuss the alleged scandal, but "the judge" or "the law" will not let them?

Another example of the misuse of court-ordered secrecy occurred in a plane crash case that I tried in 1997.[70] USAir Flight 1016 flew into a micro burst and crashed near Charlotte, North Carolina, on July 2, 1994. "Of the fifty-seven passengers on board, thirty-seven were killed and the rest were [seriously] injured."[71] All cases were transferred to me for resolution of pretrial issues pursuant to the multidistrict litigation statute.[72] While the cases were pending before me, all parties consented to a transfer of all cases to the District of South Carolina for a consolidated trial on the issue of liability. The plaintiffs asserted claims against two defendants, USAir, for pilot error, and the United States government, for the negligent acts of its air traffic controllers in failing to warn of the storm.[73]

During the pretrial stages of the case, the United States admitted that the negligence of the air traffic controllers was a proximate cause of the crash. In an ex parte conference requested by the defendants, the court was informed that the admission of liability by the government was part of a carefully crafted settlement agreement worked out between the two defendants. Although the government had admitted its liability for the accident, the parties agreed between themselves to share, on a percentage basis, payment for any settlement or judgment obtained by any of the plaintiffs.[74] The government would pay thirty percent and USAir would pay seventy percent.

At the court's urging, the defendants reluctantly agreed to provide the terms of the settlement between the defendants to the plaintiffs' Steering Committee but persuaded me to temporarily order the Steering Committee not to share the information with other counsel of record.

Shortly before trial, USAir announced that it intended to introduce the government's admission of liability in the trial before the jury. It then became apparent how and why the parties had structured their settlement the way they did, and why they wanted it to be kept from the plaintiffs' counsel and the public.[75] As I noted at the time,

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69. I acknowledge that by using Ritter and Jackson as examples of public figures who have hidden behind court secrecy orders to refuse to discuss allegations about conduct that is normally reported only in supermarket tabloids, I play into the hands of those who say that antisecrecy reforms only benefit gossip mongers. My sole reason for quoting from their interviews is that Ritter and Jackson are among the few who will actually comment on secrecy orders they persuaded a judge to sign. The vast majority of litigants who obtain such orders are savvy enough to refrain from such remarks.

70. *In re* Air Crash at Charlotte, N.C., on July 2, 1994, 982 F. Supp. 1060, 1061 (D.S.C. 1996).

71. *Id.*

72. 28 U.S.C. § 1407.

73. *In re Air Crash at Charlotte, N.C., on July 2, 1994*, 982 F. Supp. at 1062.

74. *Id.* at 1063.

75. *Id.* at 1064–65.

> [T]he effect of the settlement agreement, coupled with the admission, is to place both parties in a better position than they might otherwise be in if found liable. Certainly, as to actual damages, either party is invariably better off with some agreement to split actual damages than it would be if found solely liable. Under the settlement agreement here, however, the Government is actually in a better position than if both USAir and the Government were found liable. Thus, the Government gave up nothing in making the admission if considered in light of the settlement agreement and if it believed it would be held either solely or even jointly responsible.
>
> USAir also gains a benefit in the bargain not only by insuring the Government will pay at least some portion of any actual damages judgment, but also by limiting the probability of punitive damages awards and the risk of a runaway actual damages verdict. This is because while the Government would, if found liable, be subject only to a nonjury trial for actual damages, USAir could potentially be held liable for punitive damages, with both actual and punitive damages being decided by a jury. Thus, if USAir and the United States *could* agree to have one of them be found liable, rather than the other, with an agreement to split any actual damages on some percentage basis, conventional wisdom would dictate shifting liability to the United States.[76]

As a result, I made the settlement agreement available to all plaintiffs of record and held that if, at the trial before the jury, USAir attempted to introduce the government's admission of liability, the plaintiffs would have the option of introducing the settlement agreement in rebuttal.[77]

Meanwhile, the news media in South Carolina attempted to obtain a copy of the settlement agreement pursuant to the Freedom of Information Act.[78] I learned, to my surprise, that the government had resisted compliance with the Freedom of Information Act, citing my tentative and very temporary order directing the plaintiffs' Steering Committee not to share the information with other plaintiffs' counsel. In other words, a confidentiality order I entered in good faith was used for other purposes. Upon application of various news media sources, I relaxed the order prohibiting plaintiffs' Steering Committee from discussing the contents of the agreement and indicated my frustration that my order had been used to obstruct a legitimate Freedom of Information Act request.[79]

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76. *Id.* at 1065–66.

77. *Id.* at 1071.

78. 5 U.S.C. § 552 (2000).

79. *Ex parte* Knight Ridder, Inc., Air Crash at Charlotte, N.C. on July 2, 1994, 982 F. Supp. 1080, 1083–84 (D.S.C. 1997).

I can attest to one episode where attorneys fabricated court-ordered secrecy out of thin air. I presided over a fraud case between a local school district and a computer company.[80] Both sides claimed millions of dollars from the other and the case worked its way through the machinery of the court system for nearly three years. On the day of the pretrial conference, the parties announced a settlement: The computer company, by now nearly insolvent, would pay the school district $75,000 over a period of time. Fortunately, the settlement was announced in open court with a court reporter present. Because of the nature of the case, I told the attorneys that there was nothing for me to approve, and "all I can do is let you put [it] on the record."[81] The attorney for the computer company then said:

> The other thing [the plaintiff's attorney] asked is something about not disclosing the terms of the settlement until the settlement documents are signed. I don't have any problem with that as long as I know we are all going to abide by that. There is no confidentiality in the case. Indeed these are public funds. At some point anybody can say what they want to. I will agree with [the attorney's] suggestion.[82]

I then entered a standard order of dismissal.[83]

Imagine my surprise nine days later when I read a short newspaper article about the case which contained the following passage:

> Attorneys from both sides were tight-lipped about the terms of the settlement. [The attorney for the plaintiff] said U.S. District Judge Joe Anderson barred him from speaking about the settlement . . . .[84]

I cannot fathom why any attorney would be reluctant to talk about a relatively modest settlement in what was essentially a breach of contract claim, dressed up (as many of them are) as a fraud claim. Indeed, as the attorneys noted at the pretrial conference, since the school district in that case is a public entity, court-ordered secrecy regarding the settlement is prohibited by law.[85] Yet, for whatever reason,

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80. Chester County Sch. Dist. v. Edutek Educ. Solutions, Inc., C/A No. 0:00-2703 (D.S.C.).

81. *Id.* (transcript of May 1, 2003 Pretrial Conference, at 7).

82. *Id.*

83. Chester County Sch. Dist. v. Edutek Educ. Solutions, Inc., C/A No. 0:00-2703 (D.S.C. May 6, 2003) (order of dismissal).

84. *District, Computer Firm Reach Settlement*, THE STATE (Columbia, S.C.), May 10, 2003, at B3.

85. 1988 S.C. Op. Att'y Gen. 103 (Apr. 11, 1988) ("[S]ettlement documents for a lawsuit wherein public funds have been expended by a government agency are 'public records' subject to disclosure . . . ."). The federal government has a similar policy. *See infra* note 92 and accompanying text.

the attorneys literally conjured up a court order regarding secrecy where one did not exist, then used that mythical order to hide behind, just as Ritter and Jackson did, when questioned by the news media. Apparently "the judge made me do it" is the one answer that will silence even the most inquisitive reporters.

F. "Sealed Settlements Are Rare"

Opponents of sunshine regimes suggest that a quick review of the appropriate index in the clerk's office reveals it is rare for a judge to impose a gag order at settlement. I will concede that the vast majority of cases are settled openly. I would also contend, however, that the number of sealed settlements is greater than the index books or docket sheets would suggest. There is no standard procedure for designating settlements as sealed settlements in the index: Sometimes the index entry denotes that a settlement has been sealed, but sometimes it merely denotes an order approving a settlement. It is not until one seeks to retrieve the order, when the file package is produced from the bowels of the courthouse, that one learns that the settlement, or some aspect of the file, has been sealed. Even worse, sometimes the order approving and sealing the settlement does not appear as an entry on the docket sheet at all, as was true with the go-cart case mentioned earlier.[86]

In a four-part series on court-ordered secrecy, the *Washington Post* reported that "[n]o local courthouse [in the Washington, DC, metropolitan area] keeps a publicly available record of which lawsuits are sealed, and internal record-keeping is so haphazard that most of the courts could not provide reliable figures."[87] I believe the same is true in many courthouses around the country. Accordingly, most statistics on court-ordered secrecy should be reviewed with a degree of skepticism. As Judge John S. Martin, Jr. of the United States District Court for the Southern District of New York has observed,

> One of the problems with secret proceedings is that they are secret. If the secrecy really works, then the press is not aware of the proceeding and cannot do its job .... [I]f a proceeding is truly secret, and the only ones who are aware of it are the parties who want to keep it secret and the court, then the only one who can look at the question of whether there is a legitimate interest in keeping it secret is the court.[88]

Moreover, even if confidential settlements are occurring in only a small number of cases, the regrettable fact is that those cases are often the very cases not deserving of court-ordered secrecy. There is little concern about confidentiality in

86. *See supra* note 16 and accompanying text.
87. Walsh & Weiser, *supra* note 1.
88. *Secrecy and the Courts: The Judges' Perspective*, *supra* note 4, at 177.

cases involving a decision of whether some provision of the Internal Revenue Code is retroactive, but an auto dealer found to have rolled back odometers (who wants to remain in business) will want his settlement, and the evidence proving the wrongful conduct, sealed by court order.[89] It would be rare for a judge to be asked for court-ordered secrecy in a case involving the collection of a past due student loan, but that same judge will be told that the return and destruction of all documents is the sine qua non of a settlement of a groundwater contamination case.

G. *"Rule 5.03(c) Discriminates Against Those Who Must Have Their Settlements Approved—Those Whom the Law Otherwise Seeks to Protect"*

It has been argued that Rule 5.03(c) harms those whom the law otherwise seeks to protect: minors, incompetents, and decedents' estates, for example—those who by law *must* have their settlements approved by a court. Because existing rules require that these litigants spread the resolution of their cases on the public record, so the argument goes, Rule 5.03(c), which prohibits the sealing of these settlements, discriminates unfairly against those who are most deserving of the law's protection.

This argument also misses the mark. True, minors, incompetents, and decedents' estates could be said to be deserving of the law's solicitude, but in South Carolina and most other jurisdictions, these litigants are represented by someone with a fiduciary duty (guardian, conservator, personal representative, or executor) who *must*, under existing rules, file annual accountings with the probate court. These accountings, which would include the amount of any wrongful death or personal injury settlement, are public documents.[90] In other words, plaintiffs in these types of cases already operate under court rules that require openness.

H. *"The Plaintiff Needs Court-Ordered Secrecy"*

One argument—often the only argument—advanced by the litigants who come before my court seeking a consent order of secrecy is that the plaintiff needs to have the amount of the settlement kept confidential to protect the plaintiff from greedy relatives, telemarketers, would-be burglars, and the like. In other words, the plaintiff does not want the world to know that he or she has recently come into a sum of money. This strikes me as a weak argument in cases where the plaintiff has sustained personal injury and there is the distinct possibility that others will be injured in similar fashion. In other words, when balancing the equities in such a

89. I received such a request, which I did not accede to, in an odometer roll back case, but I have not been able to locate my file on that case.

90. *See* Letter from Amy McCulloch, Probate Judge, Richland County, South Carolina, to Joseph F. Anderson Jr., Chief Judge, U.S. District Court for the District of South Carolina (Nov. 1, 2002) (on file with author) (confirming that, with the exception of personal information such as birth dates, addresses, and account numbers which are sometimes redacted, all probate court records are public documents).

settlement, the judge should almost always strike the balance in favor of openness. If news articles are to be believed, however, judges have not done so in cases involving defective tires and abusive members of the clergy.[91] Openness has not been favored in cases of which I have direct knowledge.[92]

Moreover, the desire to protect someone from relatives, telemarketers, and burglars could also be used to keep secret the names of the winners of state-run lotteries. Yet no one would seriously argue that the names of lottery winners should be shrouded in secrecy enforced by the government. Public confidence in the operation of a lottery is based in large measure on the open way lotteries are conducted and the way winnings are announced. Public confidence in the administration of justice likewise depends, at least in part, on the way it conducts the public's business in public.

IV. THE NEED FOR SUNSHINE

Openness is an important feature of the American legal system. The federal government, a frequent litigant in federal court, has a firmly established policy against participating in secret settlements,[93] as do many states.[94] The Supreme Court has observed that "justice cannot survive behind walls of silence."[95] The right of public access to court documents and proceedings derives from two independent sources: the common law and the First Amendment. The common law presumes a right of public access to inspect and copy all judicial records and documents.[96] A court may seal judicial documents if competing interests outweigh the public's common law right of access.[97]

Unlike the common law right, the First Amendment guarantee of access has a more limited scope that "has been extended only to particular judicial records and documents."[98] The right of access attaches under the First Amendment if: (1) "the place and process have historically been open to the press and general public;" and (2) "public access plays a significant positive role in the functioning of the

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91. *See supra* note 35.
92. *See supra* notes 12 through 15 and accompanying text.
93. The government's official policy provides in part:
> (a) It is the policy of the Department of Justice that, in any civil matter in which the Department is representing the interests of the United States or its agencies, it will not enter into final settlement agreements or consent decrees that are subject to confidentiality provisions, nor will it seek or concur in the sealing of such documents. This policy flows from the principle of openness in government and is consistent with the Department's policies regarding openness in judicial proceedings (see 28 CFR 50.9) and the Freedom of Information Act . . . .

28 C.F.R. § 50.23 (2003).
94. *See supra* note 40.
95. Sheppard v. Maxwell, 384 U.S. 333, 349 (1966).
96. Nixon v. Warner Communications, Inc., 435 U.S. 589, 597 (1978).
97. *Id.* at 598–99, 602–03; *In re* Knight Publ'g Co., 743 F.2d 231, 235 (4th Cir. 1984).
98. Stone v. Univ. of Md. Med. Sys. Corp., 855 F.2d 178, 180 (4th Cir. 1988).

particular process in question."[99] The First Amendment guarantee of access, however, provides more of a presumption for openness than the common law right because before sealing may occur, "it must be shown that the denial [of access] is necessitated by a compelling governmental interest, and is narrowly tailored to serve that interest."[100]

These well-established legal principles are obviously grounded upon the fact that courts are publicly-funded institutions of government. Openness in judicial proceedings fosters a greater understanding of, and appreciation for, our legal system. More importantly, it provides a check on unbridled judicial power.

Parties to a dispute who wish to avoid the glare of publicity are free to engage in private mediation or arbitration and keep the proceedings and results secret. But when they invoke the machinery of the American legal system and ask a judicial officer and a group of conscripted fellow citizens to intervene and resolve their differences, they should, in my view, face major hurdles when they seek to have the court order that documents they authored prior to trial and more importantly, pleadings and memoranda they filed with the court, be protected from public disclosure.

It is for just these reasons that a body of law has developed establishing procedures for trial courts to follow when considering requests to seal documents. Typical of these cases is the seminal Fourth Circuit case of *In re Knight Publishing Company*.[101] *Knight* and its progeny generally require that the court provide notice of a request to seal documents and an opportunity to object to the request before the court makes its decision.[102] Also, the court must state the "reasons for its decision to seal supported by specific findings, and the reasons for rejecting alternatives to sealing in order to provide an adequate record for review."[103]

By far the greatest weakness in the procedure established by *Knight* is the watered-down notice provision. The *Knight* court said,

> [W]e believe individual notice is unwarranted. *Notifying the persons present in the courtroom* of the request to seal or docketing it reasonably in advance of deciding the issue is appropriate.[104]

To the extent the procedure established in *Knight* allows notice to "persons present in the courtroom," it is a hollow requirement indeed. Presumably, a party

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99. Press-Enterprise Co. v. Superior Court, 478 U.S. 1, 8–9 (1986), *quoted in* Balt. Sun Co. v. Goetz, 886 F.2d 60, 64 (4th Cir. 1989).

100. Globe Newspaper Co. v. Superior Court, 457 U.S. 596, 606–07 (1982); *Stone*, 855 F.2d at 180.

101. 743 F.2d 231 (4th Cir. 1984).

102. The authority to seal is the protective order provision of FED. R. CIV. P. 26(c).

103. *Knight*, 743 F.2d at 235.

104. *Id.* (emphasis added).

seeking to keep a document from public view need only turn, face the audience in the gallery, and announce that he or she wishes to file a document under seal, and the notice requirement is satisfied. This totally unworkable approach stems from the popular misconception, first seen in the Perry Mason television series and repeated in virtually all television and movie dramas that followed, that spectators crowd the galleries of America's courtrooms dutifully watching the proceedings. As I or any other trial judge can attest, it is a rare case indeed where trials, much less motions hearings, attract even a small audience of onlookers to whom notice can be given.

The lack of any real notice provision makes it easier for litigants, and compliant judges, to avoid altogether or give token consideration to the procedural requirements of *Knight*. The docket sheets for the go-cart and pharmaceutical cases mentioned in Part II of this Article, for example, reveal that the procedures of *Knight* were not followed in any respect.

Let me be clear: No court is going to deny a request to keep from public view social security numbers, customer lists, proprietary information, income tax returns, or the formula for Coca-Cola. Divorce records should belong to no one but the litigants in those cases. Grand jury proceedings always have been and always should be secret. There are times when, because of the nature of the proceeding, a courtroom must be closed. I have no real objection to keeping the amount of the settlement confidential in most cases, to minimize the possibility of frivolous copycat suits.

But suppose a letter surfaces during discovery wherein a manufacturer is asked, "[W]hat is going on? Do we have to have a fatality before any action is taken on this subject?"[105] What justification can be given for a judge *ordering* that this letter be filed under seal with the court or *ordering* that upon settlement of the case, the letter be returned and destroyed?

If a member of the clergy discloses that he enticed teenagers to have sex with him by claiming to be the Second Coming of Christ or trades cocaine for sex, should the government of the United States, through its court system, stifle this information?[106]

When a firm disposes of hazardous waste, injuring nearby residents, should the discovery obtained by the first plaintiff to bring an action be hidden from later litigants *by court order*?[107]

In my view, there are four compelling reasons that courts should avoid over-utilization of the authority given them to seal documents filed with the court and

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105. This question is from an actual letter that was originally placed under a protective order in one of the Bridgestone/Firestone tire cases. It has now been unsealed.

106. The conduct of the priest described herein was reported in the news media. *See, e.g.*, Thomas Farragher & Sacha Pfeiffer, *More Clergy Abuse, Secrecy Cases: Records Detail Quiet Shifting of Rogue Priests*, BOSTON GLOBE, Dec. 4, 2002, at A1. I do not know if these priests were involved in any of the early Catholic Church lawsuits.

107. *See supra* note 48 and accompanying text.

information associated with settlements: duplicative discovery, public safety, the need to keep our own house in order, and public confidence in the legal system.

A. Duplicative Discovery

It cannot be gainsaid that liberalized discovery rules have racheted up the cost of civil litigation in the United States. Despite the best efforts of the Advisory Committee on Civil Rules and other similar bodies, expensive and time-consuming discovery is the hallmark of most civil cases.[108] As Judge Patrick Higginbotham has observed, "The discovery beast has yet to be tamed."[109]

Additionally, refereeing contentious discovery disputes is, I sense, perhaps the most unwelcome aspect of a trial judge's work,[110] and many district judges relegate this work to magistrate judges. Additionally, inflation appears to be setting in: In past years during oral argument on a motion to compel discovery, inevitably one of the attorneys would, sometime during the argument, implore, "Your honor, you must understand . . . we are talking about literally thousands and thousands of documents!"

In recent months, however, I have learned that requests for an opponent's electronic mail communications are now in vogue, prompting one attorney to suggest to me at a discovery hearing that, including the request for electronic mail communications, a production request was "likely to exceed one million pages."[111]

The point is that the parties often overreach in their discovery requests[112] and

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108. *See, e.g.*, JAMES S. KAKALIK ET AL., JUST, SPEEDY, AND INEXPENSIVE? AN EVALUATION OF JUDICIAL CASE MANAGEMENT UNDER THE CIVIL JUSTICE REFORM ACT 1 (Rand 1996) (concluding that Congress's landmark legislation [the 1991 Civil Justice Reform Act] "had little effect on time to disposition, litigation costs, and attorneys' satisfaction and views of the fairness of case management").

109. Higginbotham, *supra* note 50, at 1417.

110. One of my colleagues, United States District Judge Wayne Alley, once vented his displeasure with discovery battles in the following order:

> Defendant's Motion to Dismiss or in the Alternative to Continue Trial is denied. If the recitals in the briefs from both sides are accepted at face value, neither side has conducted discovery according to the letter and spirit of the Oklahoma County Bar Association Lawyer's Creed. This is an aspirational creed not subject to enforcement by this Court, but violative conduct does call for judicial disapprobation at least. If there is a hell to which disputatious, uncivil, vituperative lawyers go, let it be one in which the damned are eternally locked in discovery disputes with other lawyers of equally repugnant attributes.

Krueger v. Pelican Prod. Corp., C/A No. 87-2385-A (W.D. Okla. Feb. 24, 1989).

111. Crane v. Int'l Paper Co., C/A No. 3:02-3352 (D.S.C. Apr. 25, 2003) (defendant's motion for protective order, at 2).

112. As one court colorfully observed: Even if one is entitled to embark on a fishing expedition, one must at least use a "rod and reel, or even a reasonably sized net [; not] drain the pond and collect the fish from the bottom." *In re* IBM Peripheral EDP Devices Antitrust Litig., 77 F.R.D. 39, 42 (N.D. Cal. 1977).

stonewall any request from their opponent.[113] In other words, hardball discovery, as prevalent as ever in my view, is costly to our system and consumes an inordinate amount of judicial resources.[114]

The problem is then exacerbated when judges consent to ordering the return of documents when a case is settled. Quite plainly, this means that in any future litigation involving the same issue (principally, but not always, in product liability and environmental contamination cases) the litigants will bear the cost of duplicative discovery. Nowhere is this more true than in cases where litigants, principally defendants, have established "document repositories," entire buildings where documents produced over the years are stored. The litigant in the first case seeks production of documents and is handed the key to the document repository. When the case is over, the documents go back, and the "needle in the haystack" process is repeated, at great expense, in each subsequent case.[115]

The burden on the judiciary is repeated as well. I know of nothing more time consuming than pouring through boxes of documents in an effort to be fair on a ruling concerning work product and similar issues. Judges who accede to a request that they order a return of documents after determining that the documents may be used at trial virtually guarantee that subsequent judges, facing the same issues, will needlessly expend time and resources answering the same questions.

One example from my own docket is illustrative: In 1990, I presided over the two week trial of an asbestos property damage abatement case.[116] There were numerous discovery skirmishes during the pretrial phase of the case. What documents were relevant? What documents were protected by a privilege? Were certain so-called "smoking gun" documents made by a corporate predecessor attributable to the present defendant? Should defendants be required to produce an index to its document repository? These issues, and others like them, consumed a

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113. I have presided over one discovery dispute where the defendant's attorney objected to an interrogatory, which essentially sought the names of witnesses, on the grounds that it was burdensome and oppressive, while at the same time propounding an identically worded question in his own interrogatories.

114. I have, on occasion, attempted to avoid duplication of effort by requiring a party to disclose to me if there were prior rulings on discoverability by other judges in cases involving essentially identical claims. Such efforts by me are usually unsuccessful. I am told that litigants have no way of retrieving or assimilating discovery rulings by other judges in related litigation.

115. Another judge has shared with me a copy of a letter, written from one attorney to a group of co-counsel and designated "Attorney Work Product – Confidential/Privileged," that pointedly illustrates the tactics employed by some litigants. The letter provides, in part:

> [T]he aggressive posture we have taken regarding depositions and discovery in general continues to make these cases extremely burdensome and expensive for plaintiffs' lawyers, particularly sole practitioners. To paraphrase General Patton, the way we won these cases was not by spending all of [our client's] money, but by making that other son of a bitch spend all his.

Because this letter was shared with me by another judge and is designated as confidential, I am not at liberty to identify the author or recipients. I do, however, have a copy of it in my possession.

116. BlueCross BlueShield of S.C. v. W.R. Grace & Co., C/A No. 6:89-1287 (D.S.C.).

significant amount of my time. My task was made all the more frustrating when I learned that another federal judge had wrestled with virtually identical issues in a case involving the same product, against the same defendants, and asserting the same claims for relief two years earlier. But I did not have the luxury of building upon that judge's work because, when his case settled, he ordered all documents to be returned and prohibited the sharing of information. I learned of the existence of the other case when the plaintiff's attorney in the asbestos case before me requested that I open the records in the other judge's case. I declined the request because I was powerless to do so.

One of my colleagues, United States Magistrate Judge George C. Kosko, is currently handling a civil action against an insurance company.[117] By aggressively pursuing the issue, he has learned that many of the same discovery issues he is facing have been dealt with by other judges in at least four previous cases against the same defendant.[118] In one of these earlier cases, a "consent confidentiality protective order" actually provides:

> In the event that any recipient of Confidential Information . . . is served with a request or a demand or any other legal process by one not a party to this case concerning Confidential Information subject to this Order, that person . . . shall object on the basis of this Order to producing or responding to any such request, demand, or subpoena.[119]

In essence, Judge Kosko is expressly prohibited from utilizing the discovery rulings of an earlier judge because the earlier judge barred the use of the documents in later litigation and, in fact, directed that any party faced with a request to share information, object, and cite the judge's confidentiality order as the basis for the objection.

It should be noted that I have no quarrel with what are generally termed "umbrella" protective orders under which all documents exchanged during discovery will be kept confidential while they are in the hands of the attorneys. Such orders are expressly provided for in Rule 26(c) of the Federal Rules of Civil Procedure and allow for the early exchange of information without the involvement of a judge ruling on the discovery request document by document.

It is only when one party wishes to make use of a document, by filing it with

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117. Hare v. Unum Provident Corp., C/A No. 9:02-00346 (D.S.C. 2003).

118. Civatte v. Unum Provident Corp., No. 4:00-CV-116-H(3) (E.D.N.C. Jan. 30, 2002) (Protective Order entered); Hand v. Unum Provident Corp., No. 3:01CV267WS (S.D. Miss. Oct. 3, 2001) (Protective Order entered); Chapman v. Unum Provident Corp., No. CV012323 (Cal. Super. Ct. Dec. 12, 2002) (Protective Order entered); Bellone v. Provident Life & Accident Ins. Co., No. L-2679-97 (N.J. Super. Ct. Law Div. Oct. 15, 2001) (Protective Order entered).

119. Bellone v. Provident Life & Accident Ins. Co., No. L-2679-97 (N.J. Super. Ct. Law Div. Oct. 15, 2001).

the court or referring to it in memoranda or other court documents, that concerns about duplicative discovery arise. If, after a painstaking search through an opponent's document repository and an expensive and bruising court battle over relevancy, authenticity, and admissibility, a court determines that a group of documents may be used at trial, that court should be wary of indiscriminately allowing the party to file those documents under seal. It should be even more cautious, in my view, when asked upon the conclusion of the case to order that the documents that have been determined to be germane to the case be returned, destroyed, or otherwise hidden from later litigants and judges who might be called upon to travel down the same litigation path.

B. Keeping Our Own House in Order

Most judges are of the opinion that, left to our own devices, we are able to keep our house in order and make changes to our rules and procedures when circumstances warrant. Members of the judiciary often bristle at attempts by the political branches to impose changes in our rules directly by legislation. To give just two examples, most federal judges have, in recent years, strongly opposed proposed legislation that would require judges to allow attorneys to conduct their own voir dire during jury selection[120] or allow cameras in the courtroom.[121]

It appears to me that there is somewhat of a groundswell of public opinion against courts entering secrecy orders. Many of the jurisdictions that have adopted antisecrecy rules have done so not by court initiative, but by legislative act.[122] On the national level, United States Senator Herb Kohl has, for nearly a decade, persistently, but unsuccessfully, championed federal legislation to keep court records open.[123]

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120. S. 863, 102d Cong. (1991) (requiring the court to permit plaintiff and defendant or their attorneys thirty minutes for voir dire of prospective jurors).

121. H.R. 2155, 108th Cong. (2003) (allowing media coverage of court proceedings).

122. *See supra* note 40.

123. The text of Senator Kohl's bill currently pending before the Senate reads as follows:

> Sec. 1660 . . . (a)(1) A court shall not enter an order under rule 26(c) of the Federal Rules of Civil Procedure restricting the disclosure of information obtained through discovery, an order approving a settlement agreement that would restrict the disclosure of such information, or an order restricting access to court records in a civil case unless the court has made findings of fact that–
>
> (A) such order would not restrict the disclosure of information which is relevant to the protection of public health or safety; or
>
> (B)(i) the public interest in the disclosure of potential health or safety hazards is outweighed by a specific and substantial interest in maintaining the confidentiality of the information or records in question; and
>
> (ii) the requested protective order is no broader than necessary to protect the privacy interest asserted.
>
> (2) No order entered in accordance with paragraph (1), other than an order approving a settlement agreement, shall continue in effect after the entry of final

My instincts tell me that if judges do not adopt a more common sense approach towards confidentiality in court records, then the trend towards antisecrecy legislation will continue. The news media, in particular, continues to beat the drum for openness and the issue is not going to go away. The general public is not going to be concerned with arcane matters such as attorney-conducted voir dire, but pleas from consumers who contend they were injured by a product, the defects of which were allegedly kept secret by court order,[124] will likely fall upon receptive ears. In

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judgment, unless at the time of, or after, such entry the court makes a separate finding of fact that the requirements of paragraph (1) have been met.
(3) The party who is the proponent for the entry of an order, as provided under this section, shall have the burden of proof in obtaining such an order.
(4) This section shall apply even if an order under paragraph (1) is requested--
(A) by motion pursuant to rule 26(c) of the Federal Rules of Civil Procedure; or
(B) by application pursuant to the stipulation of the parties.
(5)(A) The provisions of this section shall not constitute grounds for the withholding of information in discovery that is otherwise discoverable under rule 26 of the Federal Rules of Civil Procedure.
(B) No party shall request, as a condition for the production of discovery, that another party stipulate to an order that would violate this section.
(b)(1) A court shall not approve or enforce any provision of an agreement between or among parties to a civil action, or approve or enforce an order subject to subsection (a)(1), that prohibits or otherwise restricts a party from disclosing any information relevant to such civil action to any Federal or State agency with authority to enforce laws regulating an activity relating to such information.
(2) Any such information disclosed to a Federal or State agency shall be confidential to the extent provided by law.
(c)(1) Subject to paragraph (2), a court shall not enforce any provision of a settlement agreement between or among parties that prohibits 1 or more parties from-
(A) disclosing that a settlement was reached or the terms of such settlement, other than the amount of money paid; or
(B) discussing a case, or evidence produced in the case, that involves matters related to public health or safety.
(2) Paragraph (1) does not apply if the court has made findings of fact that the public interest in the disclosure of potential health or safety hazards is outweighed by a specific and substantial interest in maintaining the confidentiality of the information.'.
(b) TECHNICAL AND CONFORMING AMENDMENT- The table of sections for chapter 111 of title 28, United States Code, is amended by adding after the item relating to section 1659 the following:
1660. Restrictions on protective orders and sealing of cases and settlements.'.
Sunshine in Litigation Act of 2003, S. 817, 108th Cong. § 2 (2003).

124. *See, e.g., Court Secrecy: Hearing Before the Subcomm. on Courts and Admin. Practice, S. Comm. on the Judiciary* 101st Cong. 101-1139 (1990). Representative of the testimony given at previous hearings are the following excerpts:

I learned that many of their families had filed lawsuits against Shiley and Pfizer. I also learned that documents and information obtained in those lawsuits were never made public because of agreements or court orders which kept the

short, if we judges continue to ignore this issue, we may well have changes forced upon us by the political branches of government.

C. *Public Safety*

Critics of sunshine reforms have long argued that there is scant evidence that court-ordered secrecy is inimical to public safety. They suggest that the job of investigating and disclosing adverse risks to consumers is best left to regulatory agencies.

I will concede that it is not the primary function of the legal system to act as a roving ombudsman, seeking to ferret out and report dangerous products or wrongdoers who repeatedly prey upon vulnerable victims.[125] But when clearly defective products or repeat wrongdoers *are* clearly exposed as a case works its way through the cogs and gears of the legal system, should that system throw a blanket

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> information secret. I learned that Shiley had settled every fracture case out of court and, in each and every settlement, had required that the victims keep the settlements totally confidential.

Id. at 7 (statement of Frederick R. Barbee).

> They have now provided sworn statements that throughout their years of litigation, McNeil protected them with court secrecy from ever having to be deposed, and used judicially sanctioned secrecy to prevent them from disclosing the fact that they had all along urged–far earlier than, in fact, the company had acted–that actions be taken to pull the drug from the market.

Id. at 18 (statement of Devra Lee Davis).

> From our experience, it seems that big business dominates this discussion of court secrecy and the experiences of average people aren't heard. We urge the committee not to be intimidated by big business interests and listen to the voices of the victims who are the silent majority. Moreover, if something isn't done about changing the law, many more families will suffer as we have. We urge the subcommittee to work on getting more information to the public. There are already so many defective products which have been hidden by secrecy orders and we need a change. We need less secrecy in our courts, not more.

The Sunshine in Litigation Act: Hearing Before the Subcomm. on Courts and Admin. Practice, S. Comm. on the Judiciary, 103d Cong. 103-1049 (1994) (statement of Leonard and Arleen Schmidt).

125. The regulatory process does not always protect the consuming public. I once tried a case in which an insulation product used in farm buildings, advertised to be flame-resistant, was actually determined by the Federal Trade Commission to be highly flammable. As a result, the Federal Trade Commission ordered the manufacturer to warn all of its prior customers about the problem. This was not done, and a large agricultural operation in upstate South Carolina that should have received the warning burned to the ground after a spark ignited the insulation product. The failure of the manufacturer to comply with the FTC warning requirement was brought out during the trial. During deliberations, the jury sent out a question asking whether it could require the defendant to send, by registered mail, the warning the FTC had unsuccessfully required of the manufacturer. I responded to the jury that this was not their function and the jury responded with a $3 million punitive damage award (subsequently reduced by me to a $1.2 million punitive award). Spearman v. Apache Building Products, C/A No. 8:86-1504 (D.S.C. 1986).

of secrecy over the product defect or the malfeasance of the actor once the litigation has run its course?

Critics suggest that antisecrecy proponents are merely tilting at windmills, because the only thing generally sealed at settlement is the amount of money that changes hands. They suggest that dangers revealed by the case can just as easily be learned by reviewing the complaint and other documents. I have already noted that, generally speaking, I do not object to litigants keeping the amount of a settlement confidential. At times, however, the amount can be quite telling. The go-cart case referred to in Part II of this Article, for example, settled for $1.4 million—not an insubstantial sum. Interested consumers could look at the complaint and other preliminary documents filed in the case to learn of the allegations about the product defect. The trouble is, of course, that there are hundreds of thousands of cases filed in the courts of the United States annually, many of which result in summary judgment for the defendant or a nuisance-value settlement. Consulting the files of these cases would be of no real benefit. A $1.4 million settlement, however, suggests to me that the claim of product defect was a colorable one at least, and also tells me I would not want my child riding on the same model go-cart involved in that case.

D. Public Confidence in the Legal System

There is no other government institution from which so much is expected as the American system of justice. Covered extensively by the media, monitored closely by the public-at-large, and administered by men and women of differing philosophies, our system always has been and always will be a subject of debate, both within and without its ranks. Looking back on my twenty-eight years at the bar, I have come to the firm conclusion that the American people believe, fundamentally and absolutely, in the rule of law.

Regrettably, in my view, recent events have served to undermine public confidence in our legal system. "Hidden from the Public by Order of the Court" is not a concept that sits well with a citizenry that reveres openness and honesty in government. I will be the first to concede that news reports about court-ordered secrecy are overblown and often long on opinion and short on facts. I do not suggest that our court system is retreating to the days of the Star Chamber.

Opponents of secrecy reforms, however, should acknowledge that public confidence in the legal system is fragile, and courts that readily acquiesce in consent orders restricting public information about a case might be doing a disservice to our system and bring about legislatively-mandated solutions that most professionals in the legal system agree are not a good idea.

V. CONCLUSION

Critics of sunshine regimes frequently contend that public access reformers offer up nothing more than anecdotes, speculation, and conjecture. In this polemic,

I have tried to answer these critics with citations to real cases and events. In doing so, I have probably offended some of my brothers and sisters on the bench and ruffled a few feathers of the powers-that-be on the United States Judicial Conference and its committees. I do so not out of any mean spirit. We all share the same goal—the continued refinement and improvement of the fairest and best-administered system of justice in the world. As Charles Alan Wright has observed, however, "[e]ven the best system of court rules cannot remain static."[126]

Court-ordered secrecy is an issue that we in the third branch of government cannot overlook. True, court-ordered secrecy occurs in a small (though underreported) number of cases. But it is usually the very cases that are undeserving, primarily cases involving conduct with the potential for future harm, in which government-enforced secrecy is sought.

Court rules disfavoring court-ordered secrecy in cases affecting public safety are, in my view, the best judicial response to the trends described in this Article. Short of that, judicial officers at all levels must be ever-conscious of the sometimes harmful consequences—to future litigants and to our system of justice—of acquiescing in court-ordered secrecy for the sake of a settlement. A judge's signature represents a public act of a public official. Litigants should not be allowed to appropriate that signature by merely handing up a consent order, especially one that restricts access to information about the operation of the third branch of government.

126. 20 CHARLES ALAN WRIGHT & MARY KAY KANE, FEDERAL PRACTICE AND PROCEDURE, FEDERAL PRACTICE DESKBOOK § 65 (2002).

APPENDIX A

STANDARDIZED CONFIDENTIALITY ORDER

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
_____ DIVISION

_____	)	Civil Action No. _____
	)	
Plaintiff,	)	
vs.	)	
_____	)	**[Consent]** Confidentiality Order
	)	
Defendant	)	
	)	
_____	)	

[if by consent] Whereas, the parties to this Consent Confidentiality Order ("parties"), have stipulated that certain discovery material is and should be treated as confidential, and have agreed to the terms of this order; accordingly, it is this __ day of _____, 20__, ORDERED:

[if not fully by consent] Whereas, the parties to this action ("parties"), have stipulated that certain discovery material is and should be treated as confidential, and have requested that the court enter a confidentiality order; and whereas the court has determined that the terms set forth herein are appropriate to protect the respective interests of the parties, the public, and the court; accordingly, it is this __ day of _____, 20__, ORDERED:

1. **Scope.** All documents produced in the course of discovery, all responses to discovery requests and all deposition testimony and deposition exhibits and any other materials which may be subject to discovery (hereinafter collectively "documents") shall be subject to this Order concerning confidential information as set forth below.

2. **Form and Timing of Designation.** Confidential documents shall be so designated by placing or affixing the word "CONFIDENTIAL" on the document in a manner which will not interfere with the legibility of the document and which will permit complete removal of the Confidential designation. Documents shall be designated CONFIDENTIAL prior to, or contemporaneously with, the production or disclosure of the documents **[optional:** except for documents produced for inspection under the "Reading Room" provisions set forth in paragraph 4 below]. Inadvertent or unintentional production of documents without prior designation as confidential shall not be deemed a waiver, in whole or in part, of the right to designate documents as confidential as otherwise allowed by this Order.

3. **Documents Which May be Designated Confidential.** Any party may designate documents as confidential but only after review of the documents by an attorney[127] who has, in good faith, determined that the documents contain information protected from disclosure by statute, sensitive personal information, trade secrets, or confidential research, development, or commercial information. The certification shall be made concurrently with the disclosure of the documents, using the form attached hereto at Attachment A which shall be executed subject to the standards of Rule 11 of the Federal Rules of Civil Procedure. Information or documents which are available in the public sector may not be designated as confidential.

4. **[The Reading Room provisions may be appropriate only in cases involving extensive documents.] Reading Room.** In order to facilitate timely disclosure of large numbers of documents which may contain confidential documents, but which have not yet been reviewed and marked, the following "Reading Room" provisions may be utilized.

a. Documents may be produced for review at a party's facility or other controlled location ("Reading Room") prior to designation as confidential. After review of these documents, the party seeking discovery may specify those for which further production is requested. The producing party shall then copy the requested documents for production. To the extent any of the requested documents warrant a CONFIDENTIAL designation, the copies shall be so marked prior to further production.

b. Unless otherwise agreed or ordered, copies of Reading Room documents shall be requested within twenty days of review in the Reading Room and shall be produced within thirty days after the request is made.

c. The producing party shall maintain a log of persons who have reviewed documents in the Reading Room and the dates and time of their presence.

d. The production of documents for review within the confines of a Reading Room shall not be deemed a waiver of any claim of confidentiality, so long as the reviewing parties are advised that the Reading Room production is pursuant to this provision and that the Reading Room may contain confidential materials which have not yet been marked as confidential.

e. Until such time as further production is made of documents reviewed in a Reading Room, the reviewing party shall treat all material reviewed as if it was marked CONFIDENTIAL at the time reviewed.

5. **Depositions.** Portions of depositions shall be deemed confidential only if designated as such when the deposition is taken or within seven business days after receipt of the transcript. Such designation shall be specific as to the portions to be protected.

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127. The attorney who reviews the documents and certifies them to be CONFIDENTIAL must be admitted to the bar of at least one state but need not be admitted to practice in the District of South Carolina and need not apply for *pro hac vice* admission. By signing the certification, counsel submits to the jurisdiction of this court in regard to the certification.

6. **Protection of Confidential Material.**

a. **General Protections.** Documents designated CONFIDENTIAL under this Order shall not be used or disclosed by the parties or counsel for the parties or any other persons identified below (¶ 6.b.) for any purposes whatsoever other than preparing for and conducting the litigation in which the documents were disclosed (including any appeal of that litigation). The parties shall not disclose documents designated as confidential to putative class members not named as plaintiffs in putative class litigation unless and until one or more classes have been certified.

b. **Limited Third Party Disclosures.** The parties and counsel for the parties shall not disclose or permit the disclosure of any documents designated CONFIDENTIAL under the terms of this Order to any other person or entity except as set forth in subparagraphs (1)-(5) below, and then only after the person to whom disclosure is to be made has executed an acknowledgment (in the form set forth at Attachment B hereto), that he or she has read and understands the terms of this Order and is bound by it. Subject to these requirements, the following categories of persons may be allowed to review documents which have been designated CONFIDENTIAL pursuant to this Order:

(1) counsel and employees of counsel for the parties who have responsibility for the preparation and trial of the lawsuit;

(2) parties and employees of a party to this Order but only to the extent counsel shall certify that the specifically named individual party or employee's assistance is necessary to the conduct of the litigation in which the information is disclosed[128];

(3) court reporters engaged for depositions and those persons, if any, specifically engaged for the limited purpose of making photocopies of documents;

(4) consultants, investigators, or experts (hereinafter referred to collectively as "experts") employed by the parties or counsel for the parties to assist in the preparation and trial of the lawsuit; and

(5) other persons only upon consent of the producing party or upon order of the court and on such conditions as are agreed to or ordered.

c. **Control of Documents.** Counsel for the parties shall take reasonable efforts to prevent unauthorized disclosure of documents designated as Confidential pursuant to the terms of this order. Counsel shall maintain a record of those persons, including employees of counsel, who have reviewed or been given access to the documents along with the originals of the forms signed by those persons acknowledging their obligations under this Order.

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128. At or prior to the time such party or employee completes his or her acknowledgment of review of this Order and agreement to be bound by it (Attachment B hereto), counsel shall complete a certification in the form shown at Attachment C hereto. Counsel shall retain the certification together with the form signed by the party or employee.

d. **Copies.** All copies, duplicates, extracts, summaries, or descriptions (hereinafter referred to collectively as "copies") of documents designated as Confidential under this Order or any portion of such a document, shall be immediately affixed with the designation "CONFIDENTIAL" if the word does not already appear on the copy. All such copies shall be afforded the full protection of this Order.

7. **Filing of Confidential Materials.** In the event a party seeks to file any material that is subject to protection under this Order with the court, that party shall take appropriate action to insure that the documents receive proper protection from public disclosure including: (1) filing a redacted document with the consent of the party who designated the document as confidential; (2) where appropriate (e.g. in relation to discovery and evidentiary motions), submitting the documents solely for in camera review; or (3) where the preceding measures are not adequate, seeking permission to file the document under seal pursuant to the procedural steps set forth in Local Civil Rule 5.03, DSC, or such other rule or procedure as may apply in the relevant jurisdiction. Absent extraordinary circumstances making prior consultation impractical or inappropriate, the party seeking to submit the document to the court shall first consult with counsel for the party who designated the document as confidential to determine if some measure less restrictive than filing the document under seal may serve to provide adequate protection. This duty exists irrespective of the duty to consult on the underlying motion. Nothing in this Order shall be construed as a prior directive to the Clerk of Court to allow any document be filed under seal. The parties understand that documents may be filed under seal only with the permission of the court after proper motion pursuant to Local Civil Rule 5.03.

8. **Greater Protection of Specific Documents.** No party may withhold information from discovery on the ground that it requires protection greater than that afforded by this Order unless the party moves for an Order providing such special protection.

9. **Challenges to Designation as Confidential.** Any CONFIDENTIAL designation is subject to challenge. The following procedures shall apply to any such challenge.

a. The burden of proving the necessity of a Confidential designation remains with the party asserting confidentiality.

b. A party who contends that documents designated CONFIDENTIAL are not entitled to confidential treatment shall give written notice to the party who affixed the designation of the specific basis for the challenge. The party who so designated the documents shall have fifteen (15) days from service of the written notice to determine if the dispute can be resolved without judicial intervention and, if not, to move for an Order confirming the Confidential designation.

c. Notwithstanding any challenge to the designation of documents as confidential, all material previously designated CONFIDENTIAL shall continue to be treated as subject to the full protections of this Order until one of the following occurs:

(1) the party who claims that the documents are confidential withdraws such designation in writing;

(2) the party who claims that the documents are confidential fails to move timely for an Order designating the documents as confidential as set forth in paragraph 9.b. above; or

(3) the court rules that the documents should no longer be designated as confidential information.

d. Challenges to the confidentiality of documents may be made at any time and are not waived by the failure to raise the challenge at the time of initial disclosure or designation.

10. **Treatment on Conclusion of Litigation.**

a. **Order Remains in Effect.** All provisions of this Order restricting the use of documents designated CONFIDENTIAL shall continue to be binding after the conclusion of the litigation unless otherwise agreed or ordered.

b. **Return of CONFIDENTIAL Documents.** Within thirty (30) days after the conclusion of the litigation, including conclusion of any appeal, all documents treated as confidential under this Order, including copies as defined above (¶ 6.d.) shall be returned to the producing party unless: (1) the document has been entered as evidence or filed (unless introduced or filed under seal); (2) the parties stipulate to destruction in lieu of return; or (3) as to documents containing the notations, summations, or other mental impressions of the receiving party, that party elects destruction. Notwithstanding the above requirements to return or destroy documents, counsel may retain attorney work product including an index which refers or relates to information designated CONFIDENTIAL so long as that work product does not duplicate verbatim substantial portions of the text of confidential documents. This work product continues to be Confidential under the terms of this Order. An attorney may use his or her work product in a subsequent litigation provided that its use does not disclose the confidential documents.

c. **Documents Filed under Seal.** The Clerk of Court may, at the conclusion of the litigation including conclusion of any appeal, return to counsel for the parties, or destroy, any materials filed under seal. Before destroying any document filed under seal, the Clerk of Court shall advise all parties of their option to accept return or destruction and shall allow no less than thirty (30) days from issuance of the notice for counsel to respond. In the absence of a response, the Clerk of Court may destroy documents filed under seal.

11. **Order Subject to Modification.** This Order shall be subject to modification on motion of any party or any other person who may show an adequate interest in the matter to intervene for purposes of addressing the scope and terms of this Order. The Order shall not, however, be modified until the parties shall have been given notice and an opportunity to be heard on the proposed modification.

12. **No Judicial Determination.** This Order is entered based on the representations and agreements of the parties and for the purpose of facilitating discovery. Nothing herein shall be construed or presented as a judicial

determination that any specific document or item of information designated as CONFIDENTIAL by counsel is subject to protection under Rule 26(c) of the Federal Rules of Civil Procedure or otherwise until such time as a document-specific ruling shall have been made.

13. **[If by consent] Persons Bound.** This Order shall take effect when entered and shall be binding upon: (1) counsel who signed below and their respective law firms; and (2) their respective clients.

[If not by consent] Persons Bound. This Order shall take effect when entered and shall be binding upon all counsel in this action and their respective law firms and clients.

IT IS SO ORDERED.

_____
UNITED STATES DISTRICT JUDGE

_____, 20__
_____, South Carolina

[Delete Signature Blocks if not wholly by consent]

WE SO MOVE
and agree to abide by the
terms of this order

_____
Signature

_____
Printed Name

Counsel for _____

_____ ___, 200_

WE SO MOVE/CONSENT
and agree to abide by the
terms of this order

_____
Signature

_____
Printed Name

Counsel for_____

_____ ___, 200_

ATTACHMENT A

CERTIFICATION BY COUNSEL OF DESIGNATION OF INFORMATION AS CONFIDENTIAL

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
_____ DIVISION

_____)	Civil Action No. _____
)	
Plaintiff,)	Certification by Counsel of Designation
vs.)	of Information as Confidential
_____)	
)	
Defendant)	
_____)	

Documents produced herewith **[whose bates numbers are listed below (or) which are listed on the attached index]** have been marked as CONFIDENTIAL subject to the Confidentiality Order entered in this action which Order is dated _____, 20__.

By signing below, I am certifying that I have personally reviewed the marked documents and believe, based on that review, that they are properly subject to protection under the terms of Paragraph 3 of the Confidentiality Order.

Check and complete one of the two options below.

- ☐ I am a member of the Bar of the United States District Court for the District of South Carolina. My District Court Bar number is _____.

- ☐ I am not a member of the Bar of the United States District Court for the District of South Carolina but am admitted to the bar of one or more states. The state in which I conduct the majority of my practice is _____ where my Bar number is _____. I understand that by completing this certification I am submitting to the jurisdiction of the United States District Court for the District of South Carolina as to any matter relating to this certification.

_____ _____
Date Signature of Counsel

_____
Printed Name of Counsel

ATTACHMENT B

ACKNOWLEDGMENT OF UNDERSTANDING
AND
AGREEMENT TO BE BOUND

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
_____ DIVISION

_____)	Civil Action No. _____
)	
Plaintiff,)	
vs.)	Acknowledgment of Understanding
_____)	and
)	Agreement to be Bound
Defendant)	
)	
_____)	

The undersigned hereby acknowledges that he or she has read the Confidentiality Order dated_____, 20__, in the above captioned action, understands the terms thereof, and agrees to be bound by such terms. The undersigned submits to the jurisdiction of the United States District Court for the District of South Carolina in matters relating to the Confidentiality Order and understands that the terms of said Order obligate him/her to use discovery materials designated CONFIDENTIAL solely for the purposes of the above-captioned action, and not to disclose any such confidential information to any other person, firm or concern.

The undersigned acknowledges that violation of the Stipulated Confidentiality Order may result in penalties for contempt of court.

Name: _____
Job Title: _____
Employer: _____
Business Address: _____
_____
_____

Date: _____ _____
Signature

ATTACHMENT C

CERTIFICATION OF COUNSEL OF NEED FOR ASSISTANCE OF PARTY/EMPLOYEE

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
_____ DIVISION

_____)	Civil Action No. _____
)	
Plaintiff,)	Certification of Counsel
vs.)	of Need for Assistance of Party/Employee
_____)	
)	
Defendant)	
)	
_____)	

Pursuant to the Confidentiality Order entered in this action, most particularly the provisions of Paragraph 6.b.2., I certify that the assistance of _____ _____ is reasonably necessary to the conduct of this litigation and that this assistance requires the disclosure to this individual of information which has been designated as CONFIDENTIAL.

I have explained the terms of the Confidentiality Order to the individual named above and will obtain his or her signature on an "Acknowledgment of Understanding and Agreement to be Bound" prior to releasing any confidential documents to the named individual and I will release only such confidential documents as are reasonably necessary to the conduct of the litigation.

The individual named above is:

- ☐ A named party;
- ☐ An employee of named party _____. This employee's job title is _____ and work address is _____.

Date: _____ _____
Signature